

WHAT DOES THE EMERGING INTERNATIONAL LAW OF MIGRATION MEAN FOR SOVEREIGNTY?

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The emergence of an international law of migration has lent ballast to claims by philosophers who contend that ‘since the [United Nations Universal] Declaration of Human Rights in 1948, we have entered a phase in the evolution of global civil society, which is characterized by a transition from international to cosmopolitan norms of justice’. However, migrant rights are often hotly contested, not least by the states against whom they are asserted. At the very least, presumptions of absolute sovereign prerogative have been thrown into question. If national borders are far from open to migrants, one might be able to say that as a normative matter at least, they are less presumptively, or more contestedly, closed. My purpose in this article is not to mount a detailed doctrinal analysis of this emerging international law but, rather, to survey the theoretical discourses of sovereignty that create the backdrop for current debates over migration law and policy. I conclude that neither liberal nor biopolitical discourses by themselves explain the warp and weave of this emerging body of law. Rather, a structural equivocation within international law encompasses opposing positions of realpolitik apology for sovereign power on the one hand and aspiration towards utopian universality on the other. Moreover, a survey of the history of international law locates the bases for migrant rights (alongside other human rights claims) in natural law traditions that predate the rise of ‘plenary power’ conceptions of sovereignty. Before we international lawyers congratulate ourselves regarding the progressive or progressionistic roots of international law, however, the colonial dimension of those natural law traditions should be clarified. Finally, I want to explore an ethics for migration law and policy that would extend beyond the constraints that, similarly to those described above for emerging law, also characterise current discourses of reform — made salient by the recent ‘comprehensive immigration reform’ debates in the United States Congress — that is to say, beyond an apologetic pragmatics of population management on the one hand versus a utopian cosmopolitanism on the other. Somewhat tentatively for the time being I am calling this an ethics of ‘new organicism’.

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I INTRODUCTION

In the late modern age the migrant embodies multiple paradoxes. Here are three.¹

The first paradox rests on the contradiction between modernity’s claims to universality — notably the universality of human rights — on the one hand and its constitution by sovereign states on the other. Hannah Arendt’s observation, made just after the end of World War II, remains relevant:

The *Declaration of the Rights of Man* at the end of the eighteenth century was a turning point in history. It meant nothing more nor less than that from then on Man, and not God’s command or the customs of history, should be the source of Law.²

...

The people’s sovereignty (different from that of the prince) was not proclaimed by the grace of God but in the name of Man, so that it seemed only natural that the ‘inalienable’ rights of man would find their guarantee and become an inalienable part of the right of the people to sovereign self-government.

In other words, man had hardly appeared as a completely emancipated ... being ... when he disappeared again into a member of a people. From the beginning the paradox involved in the declaration of inalienable human rights was that it reckoned with an ‘abstract’ human being who seemed to exist nowhere ...³

We became aware of the existence of a right to have rights ... and a right to belong to some kind of organized community, only when millions of people emerged who had lost and could not regain these rights because of the new global political situation.⁴

¹ Cf Wendy Brown, *Walled States, Waning Sovereignty* (Zone Books, 2010). Wendy Brown offers her own three paradoxes to describe the rise of border enclosures accompanying globalisation, which entail ‘simultaneous opening and blocking ... universalization ... and stratification, and ... networked and virtual power met by physical barricades’: at 20. Seyla Benhabib, whose work is discussed throughout this essay, also centres the ‘paradox of democratic legitimacy’ — the ‘tension between universal human rights claims and particularistic cultural and national identities’: Seyla Benhabib, *Another Cosmopolitanism* (Oxford University Press, 2006) 32–3. With Benhabib, my focus is on the external aspect of the paradox that many political theorists have identified between liberalism and democracy: see, eg, Chantal Mouffe, *The Democratic Paradox* (Verso, 2000). One might say that the focus on exclusion by states attends to sovereignty’s external aspect, whereas most democratic theory considers the internal constitution of sovereignty through popular will. These two aspects influence each other, as in deliberations by constitutional and democratic theorists regarding the justifiability of a social contract or community that allocates benefits and exclusions on the basis of citizenship: see, eg, Linda Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership* (Princeton University Press, 2006). I discuss this discourse further in Part II(A) below.

² Hannah Arendt, *The Origins of Totalitarianism* (Harcourt, Brace and Company, 1951) 287.

³ *Ibid* 288.

⁴ *Ibid* 294. Arendt continued at 295:

Those who had been expelled from their home countries due to political conflicts and persecutions — persons arguably among those most in need of protection under international human rights law — enjoyed no recourse under the celebrated sources and institutions created to protect those rights adopted by the international community following World War II and just a few years before Arendt identified the ‘right to have rights’.⁵ By virtue of having been expelled by states, these stateless persons were also expelled from humanity.⁶

Arendt meant to make both a factual and a philosophical claim about the rootedness of the human condition in citizenship within specific political communities.⁷ The international world and the legal instruments designed to reflect and regulate it were based on division into states and states were ultimately responsible for conferring individual rights.⁸

As a matter of formal legal definition, this centrality of sovereignty renders the (im/em)migrant marginal to an international institutional framework predicated on the state. Liminality marks migrant identity as defined not only by the state but by the *nation*-state: that is, the state whose boundaries are intended to evoke and protect a membership community of political, cultural and often ethnic mutual belonging.⁹

This sociological subtext surfaces when considering the second paradox: that the presence of the migrant signifies simultaneously both the proximate and the remote. Translating in reverse from the equivalent French juridical term, ‘*l'étranger*’,¹⁰ allows for a contemplation of the sociologist Georg Simmel’s

These facts offer what seems an ironical, bitter, and belated confirmation of the famous arguments with which Edmund Burke opposed the French Revolution’s *Declaration of the Rights of Man*. They appear to buttress his assertion that human rights were an ‘abstraction,’ that it was much wiser to rely on an ‘entailed inheritance’ of rights which one transmits to one’s children ...

⁵ Ibid 294.

⁶ Ibid 294–5 (‘Man, it turns out, can lose all so-called Rights of Man without losing his essential quality as a man ... Only the loss of a polity itself expels him from humanity’).

⁷ See Hannah Arendt, *The Human Condition* (University of Chicago Press, 1958).

⁸ For example, protection of the human rights in the *International Covenant on Civil and Political Rights* is charged to states: see *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 2(1) (‘ICCPR’) (‘Each State Party to the present *Covenant* undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present *Covenant*’).

⁹ Bosniak, above n 1, 23. Benhabib has termed this the ‘paradox of democratic legitimacy’: Seyla Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge University Press, 2004) 43.

¹⁰ For example, the United Nations’ *Preliminary Report on the Expulsion of Aliens* is published in French as the *Rapport préliminaire sur l’expulsion des étrangers*: see Maurice Kamto, Special Rapporteur, *Preliminary Report on the Expulsion of Aliens*, UN Doc A/CN.4/554 (2 June 2005).

influential 1908 analysis of ‘the stranger’:

If wandering, considered as a state of detachment from every given point in space, is the conceptual opposite of attachment to any point, then the sociological form of ‘the stranger’ presents the synthesis, as it were, of both of these properties.

...

In the case of the stranger, the union of closeness and remoteness involved in every human relationship is patterned in a way that may be succinctly formulated as follows: the distance within this relation indicates that one who is close by is remote, but his strangeness indicates that one who is remote is near.¹¹

The definition of ‘alien’ adopted by the International Law Commission (‘ILC’) reflects the precise qualities identified by Simmel: ‘An alien is generally understood to be a natural person who is not a national of the State in which he or she is present’.¹² Both legally and epistemically then, the migrant embodies what is both present and distant and therefore what is strange, alien and outside — what is other.¹³ Doing so also reaffirms what is familiar. Through this negation and affirmation, the figure of the migrant denotes the boundaries of the national self as a social body.¹⁴ As such, the migrant as outsider is both excluded from and necessary to the nation-state. The existence of foreigners, being non-members, validates and gives value to the modern concept of a membership society: the social contract.¹⁵

It is through this very disjuncture that the migrant enacts a quintessentially modern condition, according to those analysts of modernity who have detailed its dislocating effect on society, economy and culture. The presence of the migrant implies the existence of an extensive market — as Simmel notes that historically, migrants were commonly traders and vice versa¹⁶ — the rise of both trade and migration are a product of, and produce, the powerfully disruptive and productive forces of a capitalist market economy. Culturally these same forces produce, and are a product of, rapid social transformation¹⁷ and accompanying disorientation. Simmel’s fellow sociologist Emile Durkheim termed this modern condition ‘anomie’;¹⁸ Max Weber called it ‘disenchantment’;¹⁹ and Karl Marx

¹¹ Georg Simmel, ‘The Stranger’ (Donald N Levine trans) [trans of: ‘*Der Fremde*’ in *Soziologie* (Duncker & Humblot, first published 1908)] in Donald N Levine (ed), *On Individuality and Social Forms: Selected Writings* (University of Chicago Press, 1971) 143, 143.

¹² International Law Commission, *Expulsion of Aliens — Memorandum by the Secretariat*, 58th sess, UN Doc A/CN.4/565 (10 July 2006) 23 [24] (citations omitted).

¹³ See Edward W Said, *Orientalism* (Random House, 1979).

¹⁴ The denotation of the social body is taken from Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Alan Sheridan trans, Random House, 2nd ed, 1995) [trans of: *Surveiller et punir: naissance de la prison* (first published 1975)].

¹⁵ Bonnie Honig, *Democracy and the Foreigner* (Princeton University Press, 2001). Thanks to Bernie Meyler for pointing me towards this work.

¹⁶ Simmel, above n 11, 144 (‘In the whole history of economic activity the stranger makes his appearance as a trader, and the trader makes his as a stranger’).

¹⁷ Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Beacon Press, 2nd ed, 2001).

¹⁸ See Emile Durkheim, *Suicide: A Study in Sociology* (John A Spaulding and George Simpson trans, Simon & Schuster, 1951) [trans of: *Le Suicide: Etude de sociologie* (first published 1897)].

called it ‘alienation’.²⁰ Albert Camus’ stranger literarily evokes this peculiarly modernist malaise.²¹ While the immigrant story is lionised at times in popular culture, the continual intensity of debates on immigration reform attests to the epistemic ambivalence that such narratives also evoke. If the migrant exemplifies this dynamism, performs this dislocation, then migration in this way describes the defining arc, the limit or margin, of modernity.²²

The third paradox arises out of the fact that, despite the migrant’s juridical and epistemic marginality, the contemporary era of globalisation is bringing the migrant more prominently into view. In the past, some advocates of economic globalisation erroneously presumed that opening borders to trade in goods and capital would preclude the need for the movement of persons. In fact, migration of persons constitutes a predictable and profound complement to other dimensions of globalisation.²³ In many instances, economic integration agreements formally establish the free movement of persons among member territories — not only the *Treaty on European Union*,²⁴ but also the *South American Treaty for the Establishment of a Common Market (Asunción Treaty)*,²⁵ the *Revised Treaty of the Economic Community of West African States (ECOWAS)*²⁶ and the *Treaty Establishing the Southern African Development Community*.²⁷ Other trade agreements, such as the *North American Free Trade Agreement*²⁸ and those establishing the World Trade Organization²⁹ provide limited rights of migration for temporary services. In other instances, governments have entered into specialised bilateral arrangements for the

¹⁹ See Max Weber, *The Sociology of Religion* (Ephraim Fischhoff trans, Beacon Press, 1964) [trans of: *Religionssoziologie* (first published 1922)].

²⁰ See Karl Marx, *Economic and Philosophic Manuscripts of 1844* (Martin Milligan trans, Dover Publications, 2007) [trans of *Ökonomisch-philosophische Manuskripte aus dem Jahre 1844* (first published 1932)].

²¹ Albert Camus, *The Stranger* (Matthew Ward trans, Random House, 1988) [trans of: *L’Etranger* (first published 1946)].

²² For another contemplation of the notion of the limit in law, see Anne Orford, ‘A Jurisprudence of the Limit’ in Anne Orford (ed), *International Law and Its Others* (Cambridge University Press, 2006) 1.

²³ Chantal Thomas, ‘Labor Migration as an Unintended Consequence of Globalization in Mexico, 1980–2000’ in Adelle Blackett and Christian Lévesque (eds), *Social Regionalism in the Global Economy* (Routledge, 2011) 273 (countering the conventional ‘Heckscher-Olin theory of factor complementarity’: at 286. It accomplishes this by showing how trade inflows to Mexico following the *North American Free Trade Agreement* displaced Mexican agricultural production, recruited Mexican workers to *maquiladora* factories along the border and, consequently, established conditions promoting labour migration across the border into the United States).

²⁴ *Treaty on European Union*, opened for signature 7 February 1992, [2012] OJ C 326/13 (entered into force 1 November 1993) art 3.2.

²⁵ *Treaty for the Establishment of a Common Market (Asunción Treaty)*, opened for signature 26 March 1991, 2140 UNTS 257 (entered into force 29 November 1991).

²⁶ *Revised Treaty of the Economic Community of West African States (ECOWAS)*, opened for signature 24 July 1993, 2373 UNTS 233 (entered into force 23 August 1995) art 3(2)(d)(iii).

²⁷ *Treaty Establishing the Southern African Development Community*, signed 17 August 1992, 32 ILM 120 (entered into force 30 September 1993) art 5(2)(d).

²⁸ *North American Free Trade Agreement*, opened for signature 8 December 1992, 32 ILM 612 (entered into force 1 January 1994) ch 16 (‘NAFTA’). Note, the first portion of NAFTA was published in 32 ILM 289.

²⁹ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1995).

purposes of facilitating temporary ‘guestworker’ arrangements.³⁰ Even where migration is not explicitly secured through international agreement, it nevertheless arises as a consequence of the socio-economic dynamics that support and result from such agreements. Though the economic recession of the past few years has somewhat slowed migration into the global North, overall

³⁰ See Anu Bradford, ‘Sharing the Risks and Rewards of Economic Migration’ (2013) 80 *University of Chicago Law Review* 29, 50. See also Ivan Martin, ‘Bilateral Labour Agreements in Practice: Issues and Challenges’ (Background Note, International Organization for Migration, 23 June 2011) 1:

Bilateral labour agreements ... have been the preferred means of facilitating labour mobility for a number of States. Among countries of origin, Philippines has been one of the main users of this scheme. Among countries of destination, Canada, France and Italy, and more recently Spain, have made extensive use of [bilateral labour agreements], but overall the [Organisation for Economic Co-Operation and Development] members alone have 179 of those agreements in force.

statistics bear out a steady increase in international migration levels.³¹ Most of this migration is perfectly legal — but a non-trivial

³¹ World migration has, according to the primary gatherers of such data, remained ‘relatively stable’ in the modern era, hovering around three per cent of the global population: Khalid Koser et al, ‘World Migration Report 2010 — The Future of Migration: Building Capacities for Change’ (Report, International Organization for Migration, 2010) 3, 115 (*IOM 2010 Report*). That aggregate percentage, however, belies a more dramatic reality that becomes more visible as the empirical evidence on international migration is examined more closely. When international migration is considered on its own terms, as opposed to against the global population, recent increases have actually been quite marked. The 43 per cent increase in absolute numbers of global migration amounts to only an increase from 2.9 per cent of the global population in 1990 to 3.1 per cent in 2010: Population Division, Department of Economic and Social Affairs, *Trends in International Migrant Stock: The 2008 Revision*, UN Doc POP/DB/MIG/Stock/Rev.2008 (July 2009) 1 (*UN DESA 2008 Revision*). Between 2000 and 2010, the number of annual international migrants increased from 150 million to 214 million, representing a 43 per cent increase (although migration levels have started to slow in the past couple of years with the onset of the global economic crisis): *IOM 2010 Report*, above n 31, xix; Lucie Cerna, ‘Policies and Practices of Highly Skilled Migration in Times of the Economic Crisis’ (International Migration Paper No 99, International Labour Organization, 2010). According to Gary Freedman of the University of Texas, global migration is at a higher point now than ‘at any time in world history’: quoted in, Jason DeParle, ‘Global Migration: A World Ever More on the Move’, *New York Times* (online), 26 June 2010 <<http://www.nytimes.com/2010/06/27/weekinreview/27deparle.html?pagewanted=all&r=1&>>. The contemporary migrant population is traveling primarily from the global South to the North: Population Division, Department of Economic and Social Affairs, *International Migration Report 2006: A Global Assessment*, UN Doc ESA/P/WP.209 (2009) xiv (*UN DESA 2006 Report*). Net migration from developing countries to developed countries has constituted a steady trend from 1960 to 2010: Population Division, Department of Economic and Social Affairs, *World Population Prospects: The 2008 Revision: Highlights*, UN Doc ESA/P/WP.210 (2009) 18 (*UN DESA 2008 Highlights*). About half of international migrants to the developed world go to North America and other traditional countries of emigration, such as Australia and New Zealand. In 2010, the US remained the single largest destination for migrants with about one-fifth of the world total: *IOM 2010 Report*, above n 31, 152. Beyond these ‘traditional’ destination countries, net immigration now occurs to two-thirds of developed countries including most of the more populous countries in Europe as well as Japan and Russia: *UN DESA 2008 Highlights*, UN Doc ESA/P/WP.210, 18. Indeed, the European countries when considered as a group outdo the US in hosting the single largest percentage of migrants. In 2005, Europe hosted 34 per cent of all migrants, North America 23 per cent, Asia 28 per cent and Africa 9 per cent: United Nations, ‘International Migration and Development’ (Fact Sheet, Population Division, United Nations Department of Economic and Social Affairs) <http://www.un.org/esa/population/migration/hld/Text/Migration_factsheet.pdf>. And of the top 10 countries which had the largest number of migrants in 2010, six are in Europe (France, Germany, Russia, Spain, Ukraine and the United Kingdom): *IOM 2010 Report*, above n 31, 115. Prevailing migration to the global North should not overshadow some important qualifications. First, as new high-income economies emerge outside the global North, migration from poor countries has found its way to them: *UN DESA 2008 Highlights*, UN Doc ESA/P/WP.210, 18. Some of these countries have very high migrant populations: Jordan (46 per cent), Qatar (87 per cent), Saudi Arabia (28 per cent) and the United Arab Emirates (70 per cent): *UN DESA 2008 Revision*, UN Doc POP/DB/MIG/Stock/Rev.2008, 3. Israel, Syria and Kuwait were also large migrant destinations in this period: *UN DESA 2008 Highlights*, UN Doc ESA/P/WP.210, 18 (the Syrian conflict has interrupted this trend more recently). The East Asian emerging market economies, such as Hong Kong, Singapore, Malaysia and Thailand, are also destination countries. Indeed, migration to these emerging markets is at times even more pronounced than to the global North — some Gulf states in particular have populations which are more than 50 per cent foreign-born: *UN DESA 2008 Revision*, UN Doc POP/DB/MIG/Stock/Rev.2008, 3. As a consequence of the emergence of these new high-income economies, global migration is more evenly distributed now than it was a generation ago. Secondly, certain subsets of migration are predominantly South–South. In particular, the migration of refugees and asylum seekers, although it constitutes only about 10 per cent of total migration (there were an estimated 15.2 million refugees in 2008 or

7.6 per cent of the world migrant population: *IOM 2010 Report*, above n 31, 119), primarily occurs between developing countries: United Nations High Commissioner for Refugees, '60 Years and Still Counting: Global Trends 2010' (Report, 2011) 2 ('*UNHCR Global Trends*'). Developing countries are the largest hosts of refugees. The top three in absolute numbers in 2010 were: Pakistan (1.9 million), Iran (1.1 million) and Syria (1 million). Syria has since transformed into a massive source of refugees and displaced persons, with over 2 million registered refugees and persons awaiting refugee status determination having fled the Syrian conflict: United Nations Children's Fund, 'Syria Crisis: Bi-Weekly Humanitarian Situation Report 10–24 October 2013' (Report, 24 October 2013) 1. Within the global South as a whole, Asia and the Pacific host the greatest number of refugees and the most common among these are Afghans. The United Nations High Commissioner for Refugees' ('UNHCR') Asia and Pacific region hosted one-third of all refugees and Afghan refugees constituted most (three-quarters) of that number; this was followed by sub-Saharan Africa at 20 per cent, the Middle East and North Africa at 18 per cent and Europe at 15 per cent: *UNHCR Global Trends*, above n 31, 11. Most refugees reside in neighbouring countries to their countries of origin: at 6. The report quotes António Guterres, UN High Commissioner for Refugees, at 7:

What we're seeing is worrying unfairness in the international protection paradigm. Fears about supposed floods of refugees in industrialized countries are being vastly overblown or mistakenly conflated with issues of migration. Meanwhile it's poorer countries that are left having to pick up the burden.

proportion is 'irregular'.³²

³² The best study indicates that about 10–15 per cent of Organisation for Economic and Co-Operation and Development ('OECD') country migrant populations are 'irregular', with as much as one-third of irregular migration coming from developing countries: *IOM 2010 Report*, above n 31, 120. This catch-all status of 'irregularity' includes 'forced' migration — refugees, asylum seekers and trafficked persons — and also migrants who enter, stay or work without proper documentation but whose migration is not deemed forced. The reasoning behind placing these various categories under a single expansive definition of 'irregularity' is, first, that what constitutes coercive circumstances is often very broadly defined in the literature on trafficking in persons, with economic coercion cited as a major source of pressure into certain forms of exploitative labour: see, eg, Linda A Malone, 'Economic Hardship as Coercion under the Protocol on International Trafficking in Persons by Organized Crime Elements' (2001) 25 *Fordham International Law Journal* 54. In addition, undocumented workers can include all of these migrant populations as either actual or potential members of the workforce in their country of destination: refugees and asylum seekers are likely to look for livelihood strategies that involve work; and trafficked persons are often transported expressly for the purposes of forced or exploitative work. Consequently, scholars of international migration have increasingly called for the adoption of 'irregular migration' as a catch-all category that would reflect the overlaps between these various populations: see, eg, Philippe Fargues, 'Work, Refuge, Transit: An Emerging Pattern of Irregular Immigration South and East of the Mediterranean' (2009) 43 *International Migration Review* 544, 544–5 (defining 'irregular labor migrants' as 'persons who contravene regulations on migration in force in their host country' and who include irregular labour migrants, refugees and transit migrants). Despite the obvious difficulties with data collection in this area, and the challenges related to distinguishing amongst subcategories of irregular migrants, some qualified empirical generalisations can be made about irregular migrants. For example, fluctuations in refugee movements appear to be the most intensively variable. Part of this variability stems of course from the causal relationship to given outbreaks in conflict. For example, in 2010 although the overall population of sub-Saharan African refugees had declined, this aggregate trend disguised severe displacements of Somalis brought on by the combination of drought and political upheaval: *UNHCR Global Trends*, above n 31, 11–12. Moreover, the overall decline of refugees obscured the massive dislocation of Iraqis (1.9 million) and Afghans (2.8 million), who constituted the majority of refugees over the 2000–10 period and who are concentrated in a relatively small number of countries: *IOM 2010 Report*, above n 31, 119. In addition to variability of countries of origin, however, countries of resettlement for refugees vary substantially from year to year, perhaps in response to their own domestic political sensitivities. For example, in 2009, asylum seekers in Nordic countries increased by 13 per cent, while asylum applications in Italy dropped by 42 per cent. Although data is hard to come by for trafficking in persons, according to the UN as many as 2.5 million people at any one point in time could be subject to forced labour (a slightly different category). About a quarter of a million persons, or 10 per cent of this total estimate, are located in industrialised countries, while 10 per cent are in Latin America and the Caribbean, 9.2 per cent the Middle East and 5.2 per cent in sub-Saharan Africa. The majority, that is to say the remainder of this total (56 per cent), are located in Asia and the Pacific: United Nations Global Initiative to Fight Trafficking, 'Human Trafficking: The Facts' (Fact Sheet, 2008) <http://www.unglobalcompact.org/docs/issues_doc/labour/Forced_labour/HUMAN_TRAFFICKING_-_THE_FACTS_-_final.pdf>. Half of the total estimated population of trafficked persons are believed to be involved in 'commercial sexual exploitation', defined as prostitution and other sex work industries. Almost all of the persons in this population are women and girls. Entry into trafficking in persons can come about in many ways — not only by physical coercion, but also by fraud, as when migrants believe they are being recruited for employment in one industry, such as domestic work, and then are placed in another. Increasingly, governments actively combating trafficking in persons are also becoming aware of forced labour outside of prostitution and sex work industries. Reports of forced migrant labour surface from time to time in rich as well as poor countries, as with, for example, recent reports of widespread slave-like labour conditions for guest worker harvesting of tomatoes in Florida: see Barry Estabrook, *Tomatoland: How Modern Industrial Agriculture Destroyed Our Most Alluring Fruit* (Andrews McNeel, 2011).

A *An Emerging Body of International Law*

Is international law resolving the paradoxes of migration? Migration, including unauthorised migration, appears to be an inescapable dimension of a globalising economy. Consequently, it is unsurprising that there is increased attention to the matter of what laws, rights, remedies and regulations should pertain to migrants. An emerging body of international law inscribing rights of migrants³³ appears to be challenging what has been conventionally thought a

³³ Migrants cross borders temporarily or permanently, both to work and to live. There are many different categories of the term ‘migrant’. Of course migration occurs within borders; countries are characterised by a range of governmental and cultural postures towards internal migration. In the US, for example, it is both highly common and constitutionally protected, whereas in China internal migration has been tightly controlled: see, eg, ‘840 Internal Migration’ (1996–7) 23–4 *Annual Review of Population Law* 119, 119 (describing *Shanghai Municipal Regulations Governing the Management of Migrants* (Shanghai, China) 3 October 1996). As for *cross-border* migration, immigration with *permanent resident* status in the US occurs, or is managed, through the green card system; green cards these days are more likely to be awarded to family members in order to achieve family reunification than for any other reason: see, eg, Office of Immigration Statistics, United States Department of Homeland Security, ‘2011 Yearbook of Immigration Statistics’ (Yearbook, September 2012) 18 (*2011 Yearbook*) (showing, in Table 6: Persons Obtaining Legal Permanent Resident Status by Type and Major Class of Admission: Fiscal Years 2002 to 2011, that 64.9 per cent of immigrants in this category obtained their statuses for family-reunification purposes). See also Michael Greenstone, Adam Looney and Harrison Marks, ‘The US Immigration System: Potential Benefits of Reform’ (Framing Memo, Hamilton Project, May 2012) 2:

The permanent residence system is primarily focused on family reunification, with ancillary categories for certain workers, and for refugees and others seeking asylum. In total, the United States issues roughly 1 million permanent residence visas, or ‘green cards,’ each year. Family-based visas account for roughly two-thirds of all permanent visas allotted in an average year. Just 14 percent of all permanent visas in 2010 were employment-based.

In addition, temporary immigration (which the US authorities dub ‘nonimmigration’) includes within it tourists, students and workers. The category of ‘workers’ can itself be divided in many ways and the literature commonly distinguishes between ‘high-skilled’ and ‘low-skilled’ workers. The US temporary work visa program allocates separate kinds of visas to high-skilled trainees (H1A) and short-term employees (H1B), to high-skilled ‘intra-company transferees’ (L), to agricultural workers (H2A) and to non-farm low-skilled labourers (H2B). In each of these categories, between 55 000 and 65 000 visas are awarded annually (not including various exceptions): *2011 Yearbook*, above n 33, 63–6 (Table 25: Nonimmigrant Admissions by Class of Admission: Fiscal Years 2002 to 2011). However, there are various kinds of pressures on the short-term visa system: in the case of high-skilled H1B visas, demand vastly outstrips supply for visas so that the annual cap is reached within months or even days in each new year: Neil G Ruiz and Jill H Wilson, *A Balancing Act for H-1B Visas* (18 April 2013) Brookings Institute <<http://www.brookings.edu/research/articles/2013/04/18-h1b-visa-immigration-ruiz-wilson>> (‘This year, the demand for H-1B visas has outstripped supply in five days’). In the case of agricultural workers, it is often argued that the onerous process of ‘labour certification’ that employers must undergo to hire cross-border workers promotes under-the-table hiring practices, meaning that there are estimated tens of thousands of undocumented agricultural labourers from season to season in the US. These various pressures have contributed to a variety of immigration reform proposals over the years since the major US laws establishing the immigration framework were put into place (the *Immigration Reform and Control Act of 1986*, Pub L No 99-603, 100 Stat 3359 (1986) and the *Immigration Act of 1990*, Pub L No 101-649, 104 Stat 4978 (1990)). Most recently, in January 2013, a range of proposals have emerged from the Senate accompanied by strong Presidential support: see Mark Landler, ‘President Urges Speed on Immigration Plan, but Exposes Conflicts’, *The New York Times* (New York), 30 January 2013, A1. This paper will focus primarily on documented and undocumented long-term resident migrants and short-term migrants for employment, as I think these pose the greatest conceptual challenges to the status quo.

cornerstone of statehood, the ‘plenary power’³⁴ over the determination of the rights of aliens.

Notwithstanding Arendt’s exposure of the ‘impossible human’³⁵ at the centre of an international law predicated on and mediated by sovereign states, the global order has slowly accumulated an infrastructure of both rights and institutions for the protection of non-citizens. In 1951, the very year that Arendt’s critique was published in *The Origins of Totalitarianism*, the United Nations convened a Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons and adopted the *Convention relating to the Status of Refugees*.³⁶ Further, although the texts of core human rights treaties in general do not explicitly confirm that human rights apply regardless of citizenship or

³⁴ In the US, the plenary power doctrine was established by the Supreme Court in two late 19th century decisions on the exclusion of Chinese labourers: *Ping v United States*, 130 US 581, 605–9 (1889); *Ting v United States*, 149 US 698, 711 (1893). See also Cristina M Rodríguez, ‘The Significance of the Local in Immigration Regulation’ (2008) 106 *Michigan Law Review* 567, 612–13 (‘In these cases, the Court announced the so-called plenary power doctrine, which holds that the government has plenary power over immigration admissions and removals (virtually unrestrained by the *Constitution*), and that this power is exclusively federal’).

³⁵ The ‘impossible’ identity of non-nationals has been theorised by contemporary scholars such as Fatima El-Tayeb, who focuses on the European context of third- and fourth-generation descendants from migrants for employment: Fatima El-Tayeb, *European Others: Queering Ethnicity in Postnational Europe* (University of Minnesota Press, 2011) 167 (describing the ‘peculiar experience of embodying an identity that is declared impossible even though lived by millions’). El-Tayeb points to a 2001 celebration by the city of Cologne, Germany, of the 40-year anniversary of the first recruitment agreement signed by the Turkish Labor Administration and the German Federal Employment Agency: at 145–51. Even though the event was intended to be positive, it was stated (at 145–6) that the

celebration of the positive contributions of ‘Turks’ remains well within the limits of multicultural liberalism ... Nowhere ... [is] reference[d] the possibility of a Turkish-German identity, despite the ... arrival of the first Turkish ‘guest workers’ four decades earlier ... [and] the presence of a German-born ‘Turkish’ population ... The event ... reflect[s] the dominant perception of minorities as permanent migrants, forever exiled in the no-man’s land of unclear national allegiances ...

³⁶ *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954).

documentary status,³⁷ various organs of international law have clarified that human rights protections extend to migrants, either through the interpretation of general treaty provisions³⁸ or through the adoption of specific instruments on migration.³⁹

Lawfully present resident non-nationals now enjoy many, if not most, of the social and political rights of citizens,⁴⁰ from equality and non-discrimination to specific civil and political rights such as freedom of expression and socio-economic and labour rights. In many cases, too, these rights adhere under international law regardless of the migrant's documentary status.⁴¹ Even rights of

³⁷ Most of the core human rights treaties contain clauses that guarantee protection to individuals 'without distinction' or 'without discrimination' as to a list of traits, of which race, colour and national origin are the only three common ones: see, eg, *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 2(2) ('ICESCR') ('race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'); *ICCPR* art 2(1) ('race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'); *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969) art 5 ('race, colour, or national or ethnic origin'); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 2(1) ('*Convention on the Rights of the Child*') ('race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status'); *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, opened for signature 18 December 1990, 2220 UNTS 3 (entered into force 1 July 2003) art 1(1) ('*Convention on Migrant Workers*') ('except as otherwise provided ... sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status'). Most in this subset of these treaties also contain a final catch-all category of 'other status'. The question of applicability to migrants can arise with respect to any of these terms. The term 'national origin', for example, could be interpreted to include citizens or lawful residents of any national origin but might also be applied to include migrant foreign nationals regardless of status.

³⁸ For example, the *ICCPR*'s Human Rights Committee ('HRC') has stated that 'the general rule is that each one of the rights of the *Covenant* must be guaranteed without discrimination between citizens and aliens': *General Comment No 15: The Position of Aliens under the Covenant*, as contained in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.5 (26 April 2001) 127.

³⁹ See, eg, *Convention on Migrant Workers; Convention (No 97) concerning Migration for Employment (Revised 1949)*, opened for signature 1 July 1949, 120 UNTS 71 (entry into force 22 January 1952) ('*ILO Migration for Employment Convention*'); *Convention concerning Migrations in Abusive Conditions and Promotion of Equality of Opportunity and Treatment of Migrant Workers*, opened for signature 24 June 1975, 1120 UNTS 323 (entry into force 9 December 1978) ('*ILO Migrant Workers (Supplementary Provisions) Convention*').

⁴⁰ For a discussion of the rights of aliens in the US, see Gerald L Neuman, *Strangers to the Constitution: Immigrants, Borders, and Fundamental Law* (Princeton University Press, 1996).

⁴¹ For a discussion of the rights of documented and undocumented migrants as they arise in human rights, trade, labour and criminal law treaties, see Chantal Thomas, 'Convergences and Divergences in International Legal Norms on Migrant Labor' (2011) 32 *Comparative Labor Law & Policy Journal* 405.

entry and residence⁴² have been found in some instances to curtail what has traditionally been asserted as an absolute sovereign prerogative⁴³ to exclude or expel aliens. International human rights bodies have recognised the right to due process,⁴⁴ the right to non-refoulement⁴⁵ and the right to family life⁴⁶ as

⁴² See James A R Nafziger, 'The General Admission of Aliens under International Law' (1983) 77 *American Journal of International Law* 804, 805 (emphasis added):

the general admission of aliens should not be regarded as an untrammelled discretionary power within the exclusive domestic jurisdiction of states. Therefore, although a state has no duty to admit all aliens who might seek to enter its territory, [there is] a qualified duty to admit aliens when they pose no danger to the public safety, security, general welfare, or essential institutions of a recipient state.

⁴³ Conventional wisdom holds that state sovereignty includes absolute control over territorial boundaries. This 'absolutist' position was classically articulated in Emer de Vattel, *The Law of Nations; or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns* (Joseph Chitty trans, T & J W Johnson, 1867) 169–70 [trans of: *Le Droit des gens, ou, principes de la loi naturelle appliqués à la conduit et aux affaires des nations et des souverains* (first published 1758)]:

The sovereign may forbid the entrance of his territory either to foreigners in general or in particular cases, or to certain persons or for certain particular purposes, according as he may think it advantageous to the state. There is nothing in all this that does not flow from the rights of domain and sovereignty: every one is obliged to pay respect to the prohibition; and whoever dares to violate it, incurs the penalty decreed to render it effectual.

In the US, the absolutist position was put forth in a case from 1889: *Ping v United States*, 130 US 581, 603–4 (1889), quoting *The Schooner Exchange v McFaddon*, 11 US 116, 136 (1812):

Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power. As said by this court ... 'The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction'.

⁴⁴ In deportation proceedings, trials and criminal law enforcement actions are subject to higher procedural safeguards than other forms of proceedings. Compare *ICCPR* arts 9, 12, 13 and 14. In its general comments, the HRC has cautioned that criminal due process requirements do arise where 'such procedures entail arrest': *General Comment No 15: The Position of Aliens under the Covenant*, UN Doc HRI/GEN/1/Rev.5, 129. See also Michael O'Flaherty, *Human Rights and the UN: Practice before the Treaty Bodies* (Martinus Nijhoff, 2nd ed, 2002) 21–2. For example, in *Ahani v Canada* the HRC found that a deportation order violated the treaty's restrictions on expulsion because the deportee had not, as required, been allowed 'to submit reasons against his removal in the light of the administrative authorities' case against him ... and to have such complete submissions reviewed by a competent authority': Human Rights Committee, *Views: Communication No 1051/2002*, 80th sess, UN Doc CCPR/C/80/D/1051/2002 (15 June 2004) annex ('*Views of the Human Rights Committee under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights*') [10.8] ('*Ahani v Canada*'). The procedural review appears to have been somewhat heightened by the additional consideration of non-refoulement.

overriding state determinations barring entry or commanding deportation. The ILC's *Draft Articles on the Expulsion of Aliens* — recently provisionally adopted 'on first reading' with final approval contemplated in 2015 — reflect and in some cases expand on these protections.⁴⁷ Politicising the distinctions that Arendt took to be 'ontologically given', gradually a network of rights for '*sans papiers*' has emerged.⁴⁸ Beyond formal law and legal institutions, both

⁴⁵ UN treaty bodies have held the non-refoulement obligation applicable to deportation proceedings arising under both the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) ('CAT') and the *ICCPR*. In the *CAT*, the obligation is explicit: *CAT* art 3. The *ICCPR* does not contain an explicit prohibition, but its prohibition against torture has been interpreted as implicitly incorporating a non-refoulement requirement: *Ahani v Canada*, UN Doc CCPR/C/80/D/1051/2002, [10.1]–[10.9]. Treaty bodies have imposed the principle of non-refoulement as a limit on the state's ability to expel aliens even on national security grounds. For example, in its review of a draft amendment to the Israeli *Prevention of Infiltration (Offences and Jurisdiction) Law*, the Committee against Torture (which oversees the *CAT*) found that the amendment's automatic presumption that any illegal entrant into Israel constitutes 'a risk to Israel's security and [could] ... therefore be subjected to ... return ... to the State or area of origin ... without any exceptions, procedures or safeguards' would violate the principle of non-refoulement, since such return would occur without regard to whether the returnee might be subject to torture in his country of origin: Committee against Torture, *Consideration of Reports Submitted by States Parties under Article 19 of the Convention*, 42nd sess, 893rd mtg, UN Doc CAT/C/ISR/CO/4 (23 June 2009) 7 [23]. The Committee against Torture recommended that, 'at a minimum, a provision be added to ensure an examination of the existence of substantive grounds for the existence of a risk of torture'. See also *Prevention of Infiltration (Offences and Jurisdiction) Law* (Israel) 16 August 1954.

⁴⁶ Several of the core human rights treaties recognise the family as the 'natural and fundamental group unit of society': *ICCPR* art 23(1); *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) Preamble para (x) ('*Disabilities Convention*'); *Convention on Migrant Workers* art 44. Cf *Convention on the Rights of the Child* Preamble ('the family ... [is] the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children'). These treaties also establish protections against arbitrary or unlawful interference with family life: *ICCPR* art 17; *ICESCR* art 10(1); *Convention on the Rights of the Child* art 16; *Disabilities Convention* art 22; *Convention on Migrant Workers* art 14. These standards have been applied to contest deportations. For example, in *Winata v Australia*, the HRC found that deportation of Indonesian nationals who had unsuccessfully applied for asylum constituted a violation of the right to family life because the individuals in question were parents to a 13 year old child who, having been born in Australia, held Australian citizenship and was entitled to remain in the country. Although the HRC recognised that the child could leave the country with his parents, it held that doing so would constitute a significant disruption of the 'social relationships' the boy had formed attending schools and otherwise living as an 'ordinary child': Human Rights Committee, *Views: Communication No 930/2000*, 72nd sess, UN Doc CCPR/C/72/D/930/2000 (16 August 2001) annex ('*Views of the Human Rights Committee under Article 5, Paragraph 4 of the Optional Protocol to the International Covenant on Civil and Political Rights*') [7.3] ('*Winata v Australia*').

⁴⁷ See International Law Commission, *Report of the International Law Commission on the Work of Its Sixty-Fourth Session*, UN GAOR, 67th Sess, Supp No 10, UN Doc A/67/10 (2012) ch IV(C) ('*Text of the Draft Articles on the Expulsion of Aliens Adopted by the Commission on First Reading*'). For an account of the protections contemplated in the *Draft Articles*, see Sean D Murphy, 'The Expulsion of Aliens and Other Topics: The Sixty-Fourth Session of the International Law Commission' (2013) 107 *American Journal of International Law* 164, 164–8.

⁴⁸ Andrew Schaap, 'Enacting the Right to Have Rights: Jacques Rancière's Critique of Hannah Arendt' (2011) 10 *European Journal of Political Theory* 22, 22.

governmental and non-governmental collectivities centred on the monitoring of migration have arisen.⁴⁹

This emergence of an international law of migration has lent ballast to the claims by philosophers such as Seyla Benhabib, who contend, against Arendt, that notwithstanding the importance of individual republics, these human rights of migrants ‘transcend the specific positive laws of any existing legal order by formulating binding norms which no promulgated legislation ought to violate’.⁵⁰ Benhabib argues that, ‘since the UN *Declaration of Human Rights* in 1948, we have entered a phase in the evolution of global civil society, which is characterized by a transition from *international* to *cosmopolitan* norms of justice’.⁵¹

However, migrant rights are often hotly contested, not least by the states against whom they are asserted. State objections to findings of human rights bodies,⁵² together with the low level of ratification for treaties dealing especially

⁴⁹ For example, the Global Migration Group, is a working group of international organisations and agencies, based in Geneva, that includes the International Organization for Migration (‘IOM’), the International Labour Organization (‘ILO’), the UN Office of the High Commissioner on Human Rights, the UN Conference on Trade and Development, the UNHCR, the UN Office of Drugs and Crime and the World Bank, among others: Global Migration Group (2011) <www.globalmigrationgroup.org>. Another example is the Global Forum on Migration and Development which is an intergovernmental working group and

a recent initiative of the United Nations Member States to address the migration and development interconnections in ... an informal, non-binding, voluntary and government-led process that marks the culmination of more than a decade of international dialogue on the growing importance of the linkages between migration and development.

Global Forum on Migration & Development, *Background and Objectives* (2013) <<http://www.gfmd.org/en/process/background>>.

⁵⁰ Benhabib, *Another Cosmopolitanism*, above n 1, 25.

⁵¹ *Ibid* 15–16 (emphasis in original).

⁵² National governments tend to object strenuously when their decisions to exclude, expel and deport aliens come before international bodies such as the HRC: see, eg, Human Rights Committee, *Decision: Communication No 1012/2001*, 85th sess, UN Doc CCPR/C/85/D/1012/2001 (18 November 2005) annex (‘*Decision of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights*’) [4.12] (‘*Burgess v Australia*’) (argument of Australia regarding the ‘[s]tate party’s right, under international law, to control the entry, residence and expulsion of aliens’). UN human rights treaty body views have frequently been ignored by states parties. The HRC has no jurisprudence on countries, such as the US, that have not ratified the *Optional Protocol to the International Covenant on Civil and Political Rights*: opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (setting forth the individual complaint procedure to bring claims under the *ICCPR*). Following *Ahani v Canada*, for example, the Canadian government did not comply with the HRC’s request for interim measures to allow Ahani to stay in Canada while the HRC complaint was proceeding: *Ahani v Canada*, UN Doc CCPR/C/80/D/1051/2002. It also did not respond positively to the HRC’s ultimate finding of a violation. In dismissing Ahani’s domestic claim, the Ontario Court of Appeal declared:

In signing the *Protocol*, Canada did not agree to be bound by the final views of the Committee, nor did it even agree that it would stay its own domestic proceedings until the Committee gave its views. In other words, neither the Committee’s views nor its interim measures requests are binding on Canada as a matter of international law, much less as a matter of domestic law.

Ahani v The Queen (2002) 58 OR (3d) 107, 117.

with migrant rights,⁵³ arguably call into question whether the international jurisprudence on the rights of aliens is authoritative or aspirational. Questions about the authoritativeness of migration rights under international law are only sharpened by evidence that the countries of the global North have increasingly augmented and militarised border control practices to repel unauthorised migration. The EU has built ‘Fortress Europe’⁵⁴ and the United States has adapted war machines such as ‘unmanned aerial vehicles’ or drones for border surveillance. These measures have had lethal consequences — statistics seem to bear out a fairly direct correlation between these border-strengthening measures and the rates of death amongst migrants seeking unauthorised entry.⁵⁵

Yet, as these deplorable practices persist or intensify, they are met with increased internal debate and opposition.⁵⁶ Increasingly as well, international civil society groups, such as the advocacy network ‘No One is Illegal’, have mounted public protests against the abuse of migrants and argued for their full equality.⁵⁷ At the moment, such campaigns are particularly salient in the US, given the decisive role played by immigrant groups in the 2012 presidential election.⁵⁸ Congress has responded by calling for immigration reform for the first time in several years. For example, in a widely-reported recent statement, US Senator John McCain captured the current spirit of reform that appears to be

⁵³ The 1949 *ILO Migration for Employment Convention* has 49 ratifications and the 1975 *ILO Migrant Workers (Supplementary Provisions) Convention* has 23 ratifications. The UN’s *Convention on Migrant Workers* has 47 ratifications.

⁵⁴ See Colin Harvey, ‘Fortress Europe’ [2000] (387) *Fortnight* 8.

⁵⁵ See United States Government Accountability Office, ‘Illegal Immigration: Border-Crossing Deaths Have Doubled since 1995; Border Patrol’s Efforts to Prevent Death Have Not Been Fully Evaluated’ (Report No GOA-06-770, August 2006) 6:

In 1994, the Attorney-General announced plans for the Southwest Border Strategy, an enforcement initiative designed to strengthen enforcement of the nation’s immigration laws and to shut down the traditional corridors for the flow of illegal immigration along the southwest border.

In brief, the report concluded, at 8–9 (citations omitted), that:

the increased enforcement efforts ... ultimately resulted in the redirection of migrant flows to eastern California and the Sonoran Desert of Arizona. However, [immigration authorities] did not anticipate the sizable number of migrants that would continue to attempt to enter the United States ... Studies of migrant deaths along the southwest border at the time concluded that, ... following the implementation of the strategy, there was an increase in border-crossing deaths resulting from exposure to either extreme heat or cold.

The report also states that ‘from the late 1990s through 2005, the number of deaths approximately doubled. ... Over this period, deaths due to exposure, especially heat-related exposure, increased substantially’: at 3–4.

⁵⁶ See, eg, *R v Immigration Officer at Prague Airport; Ex parte European Roma Rights Centre*, [2004] UKHL 55 (9 December 2004).

⁵⁷ See Peter Nyers, ‘No One is Illegal between City and Nation’ (2010) 4 *Studies in Social Justice* 127, 134.

⁵⁸ See, eg, Julia Preston and Fernanda Santos, ‘A Record Latino Turnout, Solidly Backing Obama’, *The New York Times* (New York), 7 November 2012, 13.

inspiring renewed debate on federal immigration law:

What is going on now is not acceptable. ... We, the American people, have been too content for too long to allow individuals to mow our lawn, serve us food, clean our homes and even watch our children while not affording them any of the benefits that make our country so great.

I think everyone here agrees that it is not beneficial for our country to have these people here hidden in the shadows. Let's create a system to bring them forward, ... [t]his is consistent with our countries [sic] tradition of being a nation of laws and a nation of immigrants.⁵⁹

Even the most sceptical must concede that, at the very least, the conventional presumptions about absolute sovereign prerogative have been thrown into question. Even if national borders are far from open to migrants, one might be able to say that as a normative matter at least they are less presumptively, or more contestedly, closed. Experts such as Guy Goodwin-Gill have long concluded that the absolutist view no longer accurately expresses positive international law:

While there can be no doubt that States do possess a broad competence in regard to foreign nationals generally, the central thesis of this work is that such competence is clearly limited and confined by established and emergent rules and standards of international law.⁶⁰

Though anxiety about globalization takes many forms, debates over migration are some of the most intense. Just as the markers of selfhood render the migrant paradoxical, so too do these paradoxes define international law and its internal tensions with the sovereign states that both define and defy it. My purpose in the rest of this article is not to mount a detailed doctrinal analysis of this international law, but rather to survey the ethical discourses that accompany current debates over migration law and policy; ethical discourses that accompany current debates over migration law and policy; to ascertain their pertinence for international law; and to determine whether a new ethics might be possible.

⁵⁹ John McCain, 'Statement by Senator John McCain on the Bipartisan Framework for Comprehensive Immigration Reform' (Press Release, 28 January 2013) 2 <www.mccain.senate.gov>. CBS Morning News, Fox News and MSNBC were among the broadcast news media that ran coverage of the Senator's statement. See also Julia Preston 'Senators Offer a New Blueprint for Immigration', *The New York Times* (New York), 28 January 2013, A1.

⁶⁰ Guy S Goodwin-Gill, *International Law and the Movement of Persons between States* (Oxford University Press, 1978) v. Professor Goodwin-Gill served as Legal Adviser in the Office of the UNHCR from 1976 to 1988. The limitation on the territorial prerogative to some degree mirrors the transformation of international law on other issues in ways that relax its classical exclusivity towards states. For example, analysts of the question of international legal personality have concluded that both natural and juridical persons can exercise direct claims under international law in certain circumstances: see, eg, Kate Parlett, *The Individual in the International Legal System: Continuity and Change in International Law* (Cambridge University Press, 2011) 120–3; Roland Portmann, *Legal Personality in International Law* (Cambridge University Press, 2010). Though a presumption may still exist in favour of state exclusivity, therefore, some have characterised contemporary international law as an 'open system': James Crawford, *International Law as an Open System: Selected Essays* (Cameron May, 2002).

Part II will look at theoretical scholarship on sovereignty as it relates to territorial control over migration. This theoretical work seems to follow parallel tracks, one normative, and the other critical: I call the first “political philosophy” and the latter “social theory,” and describe these discourses as “liberal” and “biopolitical,” respectively. This part contemplates both discourses, and examines the genealogical basis for the divide between them. Part II(A) will address the growing body of political philosophy on the territorial aspect of sovereignty, and migration debates within it, and identify competing strands of liberalism, communitarianism and cosmopolitanism. Part II(B) will consider the theoretical limitations of contemporary political philosophy that stem from its orientation towards liberal contractarianism, and the historical and conceptual split which gave rise to the more critical philosophical vein of social theory. Part II(C) will turn to biopolitical literature within social theory, situating the question of migration within a larger perspective on the management by states of populations.

Part III will reconsider the international law of migration in light of liberal and biopolitical discourses. Though both are illuminating, neither liberal nor biopolitical discourses⁶¹ by themselves fully explain the warp and weave of the emerging body of international law on migration. A structural equivocation within international law encompasses opposing positions of realpolitik apology for sovereign power on the one hand, and aspiration towards utopian universality on the other.⁶² Part III(A) will explain the ways in which aspects of biopolitical literature are in fact more consistent with positivist dimensions of international law. Part III(B) claims a particular critical approach to international law which understands the law as constantly moving between opposing poles, with much legal doctrine serving to mediate this movement and this opposition.

Part III(C) will extend this argument historically. A survey of the history of international law locates the bases for migrant rights (alongside other human rights claims) in natural law traditions that predate the rise of ‘plenary power’ conceptions of sovereignty. Sovereignty and its relationship to territoriality and migration have mutated through the development of international law; in particular, the rights of foreigners under natural law traditions anticipate the rights of migrants emerging under contemporary international law. Part III(C) will also consider the postcolonial dimensions of international law for migration, both historically and in the global political economy of today, characterised by structural inequality between the North and South. Before we international lawyers congratulate ourselves regarding the progressive or progressionistic roots of international law, however, the colonial dimension of those natural law traditions should be clarified.

Finally, Part IV explores an ethics for migration law and policy that would extend beyond the constraints that, similarly to those described above for current law, also characterise current discourses of reform — made salient recently by the spate of ‘comprehensive immigration reform’ proposals making their way out of the US Senate — that is to say, beyond an apologetic pragmatics of population management, on the one hand, versus a utopian cosmopolitanism, on the other.

⁶¹ See below Part II(C).

⁶² Here, as below, I refer to: Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, 2006).

Part IV will tentatively sketch a new normative framework for addressing issues of international law and policy, which for the time being I will call ‘new organicism’. This approach does not resolve the aporetic quality of the stranger. It does call for a vivid ethical position towards the stranger that arises from interconnectedness.

II DISCOURSES OF SOVEREIGNTY: LIBERALISM AND ITS LIMITS

A *Debates in Political Philosophy*

There is a growing body of philosophical work on the questions of sovereignty and territoriality and their implications for immigration policy. Within Anglo-American political philosophy, the primary debate has rested on the implications of liberal principles of justice. This debate belongs to a cluster of dialogues that address the problematic relationship between the nation-state and a globalising, pluralistic world.⁶³ These conversations generally revolve around the nature of the right of a given society, established as a nation-state, to exclude non-citizens. The right of exclusion has been understood variously as physical exclusion from territorial boundaries and political exclusion from civic life and citizenship.⁶⁴

1 *First Wave: Liberalism versus Communitarianism*

An early version of this contest saw the liberal argument for open borders pitted against a communitarian critique of liberalism and an associated defence of exclusionary immigration policy. These views occupied opposing poles within the received canon of Western political thought and might roughly be correlated with Isaiah Berlin’s famous opposition of ‘negative’ to ‘positive’ liberty.⁶⁵ Contemporary Anglo-American political philosophers have returned to this basic dichotomy in various arenas of debate, extending to questions of the proper immigration policy in a liberal democratic society.

By liberalism, I mean the proposition that the fundamental unit of reasoning about human values is the individual human being, each of whom is endowed with reason and dignity. This strain of thought runs through the work of John Locke and Immanuel Kant,⁶⁶ with important variations in the utilitarian thinking of Jeremy Bentham and John Stuart Mill which hold that, when aggregated into

⁶³ Related debates concern the proper role of multiculturalism in determining governmental policies and practices: see, eg, Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford University Press, 1995). There is also a debate surrounding the capacity of liberalism to give meaning to socio-political life: see, eg, Michael J Sandel, *Liberalism and the Limits of Justice* (Cambridge University Press, 2nd ed, 1998).

⁶⁴ See Bosniak, above n 1, 34.

⁶⁵ Isaiah Berlin, ‘Two Concepts of Liberty’ in Henry Hardy (ed), *Liberty: Incorporating ‘Four Essays on Liberty’* (Oxford University Press, 2002) 166.

⁶⁶ See, eg, John Locke, *Two Treatises of Government* (Hafner Publishing, first published 1689, 1947 ed); Immanuel Kant, *Perpetual Peace: A Philosophical Essay* (Mary Campbell Smith trans, George Allen & Unwin, 1917) [trans of: *Zum Ewigen Frieden: Ein philosophischer Entwurf* (first published 1795)].

society, the greatest good for the greatest number of individuals should dictate policy.⁶⁷

The 20th century formulation of John Rawls, holding that an individual determining his or her own best interest from behind a ‘veil of ignorance’ could best determine social policy, stands in direct succession to these classical Enlightenment thinkers.⁶⁸ (Rawls himself hesitated to extend his analysis across borders,⁶⁹ a limitation that is discussed in the next subsection.) In all of these versions of liberalism, society must be founded on and subordinated to the interests of individuals understood in this way. In the classical, or negative, liberal tradition, social policy must be decided on the basis of what is best for the individual.

Joseph Carens influentially argued that classical liberal reasoning requires a liberalising approach to national borders and immigration policy.⁷⁰ Developing three lines of liberal argument from three canonical liberal perspectives — Nozickian, Rawlsian and utilitarian — Carens concluded that any coherent politics based on liberalism would fail to justify exclusionary immigration policies.⁷¹ Robert Nozick’s (following Locke’s) libertarianism could not defend active border control by states;⁷² anyone in Rawls’s original position would prefer a lenient immigration policy over a strict one;⁷³ and a utilitarian calculus could not ignore needs of the global poor that could be met through more liberal immigration policies.⁷⁴

⁶⁷ See, eg, Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Oxford University Press, first published 1789, 1823 ed); John Stuart Mill, *On Liberty* (Liberal Arts Press, first published 1865, 1956 ed).

⁶⁸ John Rawls, *A Theory of Justice* (Harvard University Press, 1971).

⁶⁹ John Rawls, *The Law of Peoples; with, The Idea of the Public Reason Revisited* (Harvard University Press, 1999).

⁷⁰ Joseph H Carens, ‘Who Belongs? Theoretical and Legal Questions about Birthright Citizenship in the United States’ (1987) 37 *University of Toronto Law Journal* 413, 418 (citations omitted):

Once one starts with a commitment to liberal principles of individual freedom and the moral equality of all human beings, one is well on the road to the conclusion that political membership should be determined on the basis of individual consent, no matter how expansive a view one takes of the state’s functions.

The principle of consent, at least in the radically individualistic form I have sketched here, does indeed give rise to an understanding of political community that is fundamentally different from the principle of ascription.

⁷¹ Joseph H Carens, ‘Aliens and Citizens: The Case for Open Borders’ (1987) 49 *Review of Politics* 251.

⁷² *Ibid* 253 (‘According to Nozick the state has no right to do anything other than enforce the rights which individuals already enjoy in the state of nature. Citizenship gives rise to no distinctive claim’).

⁷³ *Ibid* 258:

Behind the ‘veil of ignorance,’ in considering possible restrictions on freedom, one adopts the perspective of the one who would be most disadvantaged by the restrictions, in this case the perspective of the alien who wants to immigrate. In the original position, then, one would insist that the right to migrate be included in the system of basic liberties for the same reasons that one would insist that the right to religious freedom be included: it might prove essential to one’s plan of life.

⁷⁴ *Ibid* 264:

By communitarianism, I mean the philosophical through-line that includes Aristotle and Jean-Jacques Rousseau,⁷⁵ in which individuals are essentially defined by their membership in a community that has its own holistic ends and that necessarily provides the foundation for meaning and fulfilment in individual human life. In the ‘positive liberal’ or communitarian tradition, what is best for the individual is substantially influenced by what defines the social interest (the ‘general will’ in Rousseau’s terms⁷⁶).

Contemporary writers such as Michael Walzer have forcefully articulated a communitarian defence for the power of distinct, historically defined cultural entities to protect themselves through formal enclosure.⁷⁷ This communitarian view rests in part on the premise that societies can only function if citizens are held together by common bonds: ‘The specifically communitarian claim is that the social relations must constitute a community in a strong sense (eg, not reducible to a contractarian scheme of social cooperation)’.⁷⁸ Exclusionary immigration policy is one dimension of the necessary self-definition and self-sustenance of communities.

Both sides of this debate have pointed out weaknesses in the other side. For example, with respect to the communitarian position, Carens has pointed out that formal self-definition of communities does not always entail the right to exclude, with sub-national units such as provinces and municipalities being examples. With respect to the liberal position, Carens’s detractors have pointed out that an extreme version of individual rights, if ‘perfected’,⁷⁹ would render society unworkable. Further, once social limitations of any sort are introduced, the case from liberalism for open borders weakens substantially, because then immigration policy becomes, like any other, a balancing act of variously defined social and individual interests.

Liberal and communitarian reasoning can of course be invoked to defend opposing sides of the debate as well. For example, some have argued that the liberal right to freedom of association can be understood as a group right in the case of societies that entails their right to exclusion⁸⁰ (though this liberal defence of exclusion has been rejected by others on the grounds that collective entities such as states cannot be analogised to individuals with respect to the freedom of

Whatever the method of calculation, the concerns of aliens must be counted too. Under current conditions, when so many millions of poor and oppressed people feel they have so much to gain from migration to the advanced industrial states, it seems hard to believe that a utilitarian calculus which took the interests of aliens seriously would justify [significant] ... limits on immigration ...

⁷⁵ But not, in this discourse, to Georg Hegel. However, see below n 124.

⁷⁶ Jean-Jacques Rousseau, *The Social Contract and Other Later Political Writings* (Victor Gourevitch trans, Cambridge University Press, 1997) [trans of: *Du Contrat social ou principes du droit politique* (first published 1762)].

⁷⁷ Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (Basic Books, 1983).

⁷⁸ Arash Abizadeh, ‘Does Liberal Democracy Presuppose a Cultural Nation? Four Arguments’ (2002) 96 *American Political Science Review* 495, 496.

⁷⁹ Peter C Meilaender, ‘Liberalism and Open Borders: The Argument of Joseph Carens’ (1999) 33 *International Migration Review* 1062.

⁸⁰ Christopher Heath Wellman, ‘Immigration and Freedom of Association’ (2008) 119 *Ethics* 109, 111. See also David Miller, *On Nationality* (Oxford University Press, 1995).

expression).⁸¹ Conversely, some political theorists with communitarian sympathies have tried to chart out a vision of politics sensitive to community identities that does not rest as heavily on exclusionary rights. For example, in a cognate to the immigration debate, the debate over multiculturalism, writers such as Charles Taylor have sought to vivify the claim of distinct cultural groups to some forms of self-preservationist policy.⁸²

2 *Second Wave: Cosmopolitanism*

A later wave of political theory took up the question of territorial prerogative, but in a new direction that explores cosmopolitan bases for transcending the state.

Kantian thought forms the basis of this cosmopolitan liberalism, with its focus on ‘relations which hold among individuals *across* bounded communities’.⁸³ Kant’s categorical imperative grounds an unbounded view of individualism: ‘every human being has a global stature as an ultimate unit of moral concern’.⁸⁴

Cosmopolitan liberalism adopts a different form of reasoning than the first-wave liberalism of Carens, described in the section above. Carens concludes that liberalism, if focused on the individual, cannot support closed borders. There is no particular need to theorise the relations between individuals, other than what is required through respect for individual rights. By contrast, cosmopolitanism looks also to the question of what relations exist between individuals, not as a simple consequence of individual right, but rather a priori, and denies that community or state boundaries can justifiably demarcate those relations.

The cosmopolitan turn potentially resolves the communitarian objection to liberalism, which is that liberalism denies the importance of human relationships. In the earlier wave, this terrain was left solely to the communitarians, who could argue that liberalism overlooks a central part of life’s meaning and of human identity arising from the embeddedness of individuals within particular relations (that take the form of communities and states).

Cosmopolitanism provides a rejoinder to communitarianism by arguing for relationality between humans as does communitarianism itself — but a different kind of relationality, one that transcends state borders. The question then becomes what level of proximity or distance can support this idea of meaningful human relations that entail mutual rights and duties.⁸⁵

Cosmopolitan liberals have developed various approaches to global justice, all based on this fundamental tenet. Thomas Pogge, for example, is perhaps best known for his critique of Rawls’s limitation of his own theory of justice to conditions obtaining within bounded, liberal-democratic societies. Pogge⁸⁶ and

⁸¹ Sarah Fine, ‘Freedom of Association is Not the Answer’ (2010) 120 *Ethics* 338, 346–8.

⁸² Charles Taylor, *Reconciling the Solitudes: Essays on Canadian Federalism and Nationalism* (McGill-Queen’s University Press, 1993).

⁸³ Benhabib, *The Rights of Others*, above n 9, 25 (emphasis in original).

⁸⁴ Thomas W Pogge, ‘Cosmopolitanism and Sovereignty’ (1992) 103 *Ethics* 48, 49.

⁸⁵ See, eg, Leif Wenar, ‘What We Owe to Distant Others’ (2003) 2 *Politics, Philosophy & Economics* 283.

⁸⁶ Thomas W Pogge, *Realizing Rawls* (Cornell University Press, 1989).

others⁸⁷ have argued that there is no morally sound reason to limit Rawlsian principles in this way.

Applying cosmopolitan liberalism to the question of immigration policy, Benhabib has focused on the ‘Third Article’ of Kant’s essay on ‘Perpetual Peace’, which is that ‘The Law of World Citizenship Shall be Limited to Conditions of Universal Hospitality’.⁸⁸ Benhabib argues that Kant’s philosophy rests on a ‘construct of a “common possession of the surface of the earth”’, so that ‘to deny the foreigner and the stranger the claim to enjoy the land and its resources, when this can be done peacefully and without endangering the life and welfare of original inhabitants, would be unjust’.⁸⁹ Others have taken this premise further, arguing that a cosmopolitan democratic politics requires a rewiring of the political process to include non-citizens, at least insofar as territoriality and immigration policy are concerned.⁹⁰

3 *Third Wave: Conditions of Sovereignty*

Beyond the question of whether existing states owe duties to others or should be open to others, an emerging discourse in political theory has sought to re-imagine the basis for statehood *tout court*. This new round of theory moves beyond debating whether, in liberal democratic states, borders should be open. Rather, it asks what justifies the existence of those borders in the first place. Some of these contemporary political philosophers tread on ground much tilled by international legal actors. For example, in a recent essay, Anna Stilz offers a ‘legitimate state theory’ setting forth normative justifications for territorial jurisdiction.⁹¹ Stilz holds that:

a state has rights to a territory if and only if it meets the following four conditions: (a) it effectively implements a system of law regulating property there; (b) its subjects have claims to occupy the territory; (c) its system of law ‘rules in the name of the people,’ by protecting basic rights and providing for political participation; and (d) the state is not a usurper.⁹²

Stilz’s formulation deceptively appears to resemble the cumulative parameters of a near-century of international law. The ‘best known formulation of the basic

⁸⁷ See, eg, Charles R Beitz, ‘Justice and International Relations’ (1975) 4 *Philosophy & Public Affairs* 360.

⁸⁸ Benhabib, *The Rights of Others*, above n 9, 26, quoting Immanuel Kant, ‘Perpetual Peace: A Philosophical Sketch’ (H B Nisbet trans) in H S Reiss (ed), *Kant: Political Writings* (Cambridge University Press, 2nd ed, 1991) 93, 99–108 [trans of: *Zum ewigen Frieden: Ein philosophischer Entwurf* (first published 1795)].

⁸⁹ Benhabib, *The Rights of Others*, above n 9, 30, quoting Kant, ‘Perpetual Peace’, above n 88, 93.

⁹⁰ See, eg, Arash Abizadeh, ‘Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders’ (2008) 36 *Political Theory* 37. These cosmopolitan claims as a potential basis for new ethics will be reconsidered below in Part IV.

⁹¹ Anna Stilz, ‘Nations, States, and Territory’ (2011) 121 *Ethics* 572, 574.

⁹² *Ibid.*

criteria of statehood'⁹³ can be found in art I of the 1933 *Montevideo Convention on the Rights and Duties of States* ('*Montevideo Convention*'):⁹⁴

The State as a person of international law should possess the following qualifications:

- (a) a permanent population;
- (b) a defined territory;
- (c) government; and
- (d) capacity to enter into relations with other States.

Implied in the *Montevideo Convention* criterion of 'government' is the requirement that government be effective. It is this 'requirement that a putative State have an effective government' more than any of the other three in the classic *Montevideo Convention* formula, that is 'central' to the 'claim to statehood' and therefore determinative of sovereignty.⁹⁵

This notion of effectiveness would seem to be very similar to Stilz's requirement that a state 'effectively implement a system of law regulating property'. Yet the conceptual gap between the two, I would argue, is quite vast. The *Montevideo* 'effective government' criterion rests on a long tradition of positivist jurisprudence which ascribes sovereignty to the fact of coercive control over territory. John Austin's early 19th century *Lectures on Jurisprudence* provides the canonical example.⁹⁶

By contrast, because the focus of Stilz's criterion is on the ability of the state to implement 'law regulating property',⁹⁷ it seems to flow from a Lockean conception of governmental legitimacy resting on the ability of the government to protect the natural justice claims of its citizens, the most important of which is property.⁹⁸ This conception is further affirmed by Stilz's requirement that the

⁹³ James Crawford, *The Creation of States in International Law* (Oxford University Press, 2nd ed, 2006) 45.

⁹⁴ *Convention on the Rights and Duties of States*, opened for signature 26 December 1933, 165 LNTS 19 (entered into force 26 December 1934) ('*Montevideo Convention*'). This brief formulation, of course, raises a number of questions and is subject to multiple interpretations in many of its aspects. For example, one of the ongoing debates regarding the recognition of states is whether recognition by the international community is constitutive of states, so that these criteria effectively serve as guidelines in determining the decisions by other states whether or not to afford recognition; or whether state recognition is merely declaratory of statehood once it has been achieved through these criteria: see Crawford, *Creation of States*, above n 93, 19–28. Additionally, each of the criteria has their test cases, as in when, for example, parts of the claimed territory are subject to dispute: at 50 (discussing such test cases and quoting the pronouncement of the International Court of Justice's ('ICJ') *North Sea Continental Shelf Cases* judgment, stating that there is 'no rule that the land frontiers of a State must be fully delimited and defined': *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark) (Judgment)* [1969] ICJ Rep 1969 3, 32.

⁹⁵ Crawford, *Creation of States*, above n 93, 55.

⁹⁶ John Austin, *The Province of Jurisprudence Determined* (Prometheus Books, first published 1832, 2000 ed).

⁹⁷ Stilz, above n 91, 574.

⁹⁸ Locke, above n 66, 184 ('The great and chief end, therefore, of men's uniting into commonwealths and putting themselves under government is the preservation of their property'). Locke did define 'property' expansively, as constituting 'lives, liberties, and estates', but the emphasis on possessions is nevertheless unmistakable: at 184 ('If man in the state of nature be so free, as has been said, if he be absolute lord of his own person and possessions ... why will he part with his freedom ... and subject himself to the dominion and control of any other power?').

state must ‘rule in the name of the people’ and protect basic rights and political participation.⁹⁹ In other words, Stilz’s theory rests state legitimacy on reciprocity between state and people. In this sense, it is an heir to classic liberal social contract theory. The social fact of power constituting its own justification is missing and no doubt intentionally so.

And yet a central preoccupation of international law is the necessity of keeping the facticity of power in view. James Crawford observes:

the classical criteria for statehood (the so-called ‘Montevideo criteria’) were essentially based on the principle of effectiveness. The proposition that statehood is a question of fact derives strong support from the equation of effectiveness with statehood.¹⁰⁰

The consequence of failing to do so, for classic international lawyers, would be the provocation of a ‘fatal conflict between law and fact’.¹⁰¹

International law’s focus on effective power is not exclusive of moral considerations: there is a role for international law, albeit an ambiguous and complex one, in determining that a government enjoys both ‘the actual exercise of authority, and the right or title to exercise that authority’.¹⁰² Thus, there is some reflection of Stilz’s emphasis on the normative legitimacy of the state. For example, in the International Court of Justice’s case *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276*, the Court responded to the request for an advisory opinion by the UN Security Council, which had, together with the UN General Assembly, declared that South Africa’s rule in Namibia could no longer be considered legitimate given the apartheid system.¹⁰³ Departing from the more wholly positivist approach laid down only a few years before in the *South West Africa (Ethiopia v South Africa)* case¹⁰⁴ and so signalling a turn of international law towards the embrace of principles of human rights and self-determination, the Court affirmed that South Africa was obligated to ‘withdraw immediately’ from Namibia.¹⁰⁵

Karen Knop’s careful study of self-determination in international law has demonstrated, however, that, as a doctrine in international law, the operative scope of self-determination appears to have been limited to cases of decolonisation, such as that of Namibia’s pursuit of liberation from South

⁹⁹ Stilz, above n 91, 574.

¹⁰⁰ Crawford, *Creation of States*, above n 93, 97.

¹⁰¹ *Ibid*, quoting Jean Charpentier, *Le Reconnaissance Internationale et l’évolution du droit des gens* [International Recognition and the Evolution of International Law] (A Pedone, 1956) 127–8 (warning against ‘entraîner fatalement un conflit [sic] entre le droit et le fait’ [bringing about a fatal *conflict between law and fact*] [author’s trans] (emphasis in original)).

¹⁰² Crawford, *Creation of States*, above n 93, 57.

¹⁰³ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (Advisory Opinion)* [1971] ICJ Rep 16 (‘*Namibia*’).

¹⁰⁴ In which the ICJ President cast a vote to decide an evenly-divided Court in favour of the respondent, South Africa, against claims by Ethiopia and Liberia, finding that the latter had no standing to challenge the legitimacy of South Africa’s continued rule: *South West Africa (Ethiopia v South Africa) (Judgment)* [1966] ICJ Rep 6, 51.

¹⁰⁵ *Namibia* [1971] ICJ 16, 58.

African apartheid rule.¹⁰⁶ Claims within existing states by the people against the government are either ineffectual or, at the least, largely non-justiciable as an international legal matter.

Needless to say, within international law a great deal of debate characterises the question of to what degree notions of self-determination and human rights have superseded positivist conceptions of power.¹⁰⁷ The emergence of international criminal tribunals and transitional justice mechanisms would certainly seem to suggest the development of greater justiciability of precisely these sorts of claims.¹⁰⁸ The point here is not to mark the precise line between competing conceptions but, rather, simply to point out how influential the positivist concept continues to be in international law.¹⁰⁹ Notwithstanding the potential qualification that may rest in normative contestations of a government's rightful rule, the core of the doctrine supports the conclusion that 'to be a State, an entity must possess a government or a system of government in general control of its territory'.¹¹⁰

Though Stilz comes close to capturing prevailing sentiment within international law, her formulation stops short of the positivist ethos. This ethos locates the centre of legitimate statehood in effectiveness of governmental power: the connection of power to popular will is a limiting factor in terms of the

¹⁰⁶ Karen Knop, *Diversity and Self-Determination in International Law* (Cambridge University Press, 2002). See also Lea Brilmayer, 'Secession and Self Determination: A Territorial Interpretation' (1991) 16 *Yale Journal of International Law* 177 (explaining that the analogy to property explains why self-determination supports claims of decolonisation but not secession, given that the former equates to a remedy for the tort of trespass and the latter does not). To what extent the principle of self-determination extends beyond the relatively narrow case of self-determination is, of course, subject to debate.

¹⁰⁷ In particular, the contrasting views of Crawford, Higgins and Cassese. A more fully progressive view is represented by Cassese: see Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press, 1995).

¹⁰⁸ See Ruti Teitel's recent work on humanity's law: Ruti G Teitel *Humanity's Law* (Oxford University Press, 2011).

¹⁰⁹ For typology of positions on this, see Koskenniemi, *From Apology to Utopia*, above n 62, 184–5 (laying out four variants of the combination of the normative and the concrete in international law: the 'rule-approach' emphasising power politics; the 'policy-approach' that sees all (governmental or non-governmental) global processes as part of international law; the 'idealistic position'; and the 'sceptical position').

¹¹⁰ Crawford, *Creation of States*, above n 93, 59.

actual operation of the international law of statehood and the recognition of states, rather than a founding principle.¹¹¹

The reliance of Austinian positivists on power is, at the same time, precisely the element much-decried in international law by reformers and rights advocates. Without question, it is the positivist view that leads directly to realpolitik methods of understanding international relations and, the critics would argue, to cynicism and/or nihilism. Both Austin and his 20th century realpolitik counterparts, such as Hans Morgenthau, asserted that international law as such

¹¹¹ Cf Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press, 1994) 115–17 (arguing against the view that self-determination has been applied concretely in international law and asserting that it extends to other cases of ‘peoples subject to foreign or alien domination’ as ‘spelled out in the UN *Declaration on Friendly Relations* of 1970’ and pointing out that UN treaty bodies such as the HRC have slowly developed a set of expectations relating to internal self-determination in terms of a people’s right to determine its own ‘political and economic system’). See also *Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations*, GA Res 2625 (XXV), UN GAOR, 25th sess, 1883rd plen mtg, Agenda Item 85 (24 October 1970). This debate in turn implicates the debate regarding the extent to which non-state actors can assert international legal personality, for example, to claim remedies for rights violations under international law. For a survey of international legal doctrine and typology of five contending conceptions of international legal personality, see Portmann, above n 60. Rosalyn Higgins’s relatively progressive view reflects the ‘actor’ conception of legal personality in Portmann’s typology (similar to the ‘policy-approach’ described by Koskeniemi: Martti Koskeniemi, *From Apology to Utopia*, above n 62, 184).

did not exist, but was merely an effect of relations of power.¹¹² International lawyers are familiar with the oscillation between the two poles of the ideal and the real.¹¹³ Normative political theory, such as that of liberal philosophy, might be seen either as offering a useful corrective or as eclipsing an essential aspect of the analysis.

Given the cynical shadow cast by positivism/realism, there would seem from a progressive point of view to be little reason to take exception with efforts to eliminate positivism from international law and legal theory and instead to rest legitimacy on notions of social contract and popular will. Indeed, from this perspective, and in contrast to Arendt's view above, sovereignty is the 'S' word (as Louis Henkin put it,¹¹⁴ among others¹¹⁵), an enemy of human rights. Notions of the rule of law, the right to democracy and good governance, all touchstones of much discourse in contemporary international law and policy, are closely

¹¹² See Austin, above n 96, 11–12 (emphasis in original):

the aggregate of the rules, established by political superiors, may also be marked commodiously with the name of *positive law*.

...

[I]mproperly termed *laws* ... [are] rules set and enforced by *mere opinion*, that is, by the opinions or sentiments held or felt by an indeterminate body of men in regard to human conduct. ... [R]ules of this species constitute much of what is usually termed 'International law.'

Austin further clarifies the mutuality of law and power (at 13–14) (emphasis in original):

laws or rules, properly so called, are a *species* of commands.

...

A command is distinguished from other significations of desire, not by the style in which the desire is signified, but by the power and the purpose of the party commanding to inflict an evil or pain in case the desire be disregarded.

As Robert Keohane has observed:

World War II elevated this realist perspective to the new orthodoxy in Anglo-American thinking on international affairs. The struggle with Nazism cast doubt on the efficacy of international law and emphasized the role of power in world politics.

...

It is therefore not surprising that during and immediately after World War II the tradition of power politics was revived and reinvigorated in the United States. John Herz, George F Kennan, Walter Lippman, and Hans J Morgenthau articulated what Morgenthau called 'political realism,' in contrast to the 'utopianism,' 'legalism,' or 'idealism' that they associated with liberal writers on international affairs.

...

Morgenthau characterized international politics as a struggle for power and argued that it could be understood by assuming that statesmen 'think and act in terms of interest defined as power'.

Robert O Keohane, 'Realism, Neorealism and the Study of World Politics' in Robert O Keohane (ed), *Neorealism and Its Critics* (Columbia University Press, 1986) 1, 9–10, quoting Hans J Morgenthau, *Politics among Nations: The Struggle for Power and Peace* (Alfred A Knopf, 4th ed, 1967) 5.

¹¹³ Koskenniemi, *From Apology to Utopia*, above n 62, 164.

¹¹⁴ Louis Henkin 'That "S" Word: Sovereignty, and Globalization, and Human Rights, Et Cetera' (1999) 68 *Fordham Law Review* 1.

¹¹⁵ See, eg, Maxwell O Chibundu, 'Intervention, Imperialism and Kant's Categorical Imperative' (2001) 7 *International Legal Theory* 41, 45; June McCue, 'New Modalities of Sovereignty: An Indigenous Perspective' (2007) 2 *Intercultural Human Rights Law Review* 19, 20.

related here.¹¹⁶ And, looking back at the history of international law, it is also true that high positivism coincided with the explosion of war and colonial occupation. Arguments for absolute sovereignty would seem to have justified, and to continue to justify, all that is corrupt, authoritarian and brutal about political regimes.

It turns out that the legitimation of power for power's sake, though an important product of international legal positivism, is neither its only foundation nor its only application. The influence of positivism is not just a question of different disciplines but, rather, also reflects a philosophical difference. In the next section I will discuss the ways in which liberal philosophical discourse, through its normative commitments to contractarianism, intentionally elides the question of power and in so doing potentially narrows the range of its perception and application.

B *The (Security) State and the Limitations of Liberalism*

The political philosophers marking out this new debate in their field are seeking not to commit David Hume's naturalistic fallacy, imputing from the 'is' to the 'ought'.¹¹⁷ But in doing so, do they ignore at analytical peril the ideational hold of the 'is'?

Western political theory and Western jurisprudence share common ancestors.¹¹⁸ However, the theoretical priors of each field diverge at the point in which positivism becomes clearly distinguished from natural law. This divergence can be seen by contrasting the way that contemporary political philosophers, as compared to lawyers, address issues relevant to international law. One could, wrongly, say that this is because lawyers concern themselves with what the law is, whereas philosophers, where they consider law, are primarily concerned with what the law ought to be. But this distinction patently fails, because jurists are, of course, often also concerned with what the law ought to be; though much legal analysis is doctrinal and technical, larger questions of legal justice are concerned with fundamental principles.

Rather than a divergence of materials or techniques then, the distinction lies in the fact that liberal political philosophy misses or excludes the idea of law as power. By contrast, all jurisprudential approaches — other than natural law — in one way or another make a point of establishing the analytical distance between what ought to be and what is. My argument here is that the reasons for this lie

¹¹⁶ See, eg, Douglass C North, *Institutions, Institutional Change and Economic Performance* (Cambridge University Press, 1990); Joseph S Nye and John D Donohue (eds), *Governance in a Globalizing World* (Brooking Institution Press, 2000); Thomas M Franck, 'The Emerging Right to Democratic Governance' (1992) 86 *American Journal of International Law* 46.

¹¹⁷ David Hume, *A Treatise of Human Nature* (Everyman, first published 1739, 2003 ed) 258 (emphasis in original) (citations omitted):

In every system of morality, which I have hitherto met with, I have always remark'd, that the author proceeds for some time in the ordinary ways of reasoning, ... when all of a sudden I am surpriz'd to find, that instead of the usual copulations of propositions, *is*, and *is not*, I meet with no proposition that is not connected with an *ought*, or an *ought not*. This change is imperceptible; but is, however, of the last consequence ... [as] ... this small attention wou'd subvert all the vulgar systems of morality ...

¹¹⁸ For example, Hugo Grotius, Locke, Thomas Hobbes, Rousseau and Kant, among others.

not only in professional or disciplinary expertise but rather, and perhaps counterintuitively, within normative bases: contra Hume's is-ought distinction. Perhaps surprisingly, the same critique of liberal political philosophy that is implicit in positivist legal theory also opens a foothold for biopolitical discourse.

The two bases for the critique of liberalism that I define here — the concern for political stability and the critique of domination — arise out of a sensitivity to the horror of political violence. As such, the paradox of positivism in these two iterations (by no means do I extend this sensitivity to all positivist outlooks)¹¹⁹ is that attention to power is called for precisely because of concern for the potentially violent effects of liberal law and policy. In other words, if liberal political philosophy as a whole famously rejects the equation of 'is' to 'ought' as a basis for theory, there are nevertheless contrary perspectives that hold that the 'is' (cannot be escaped and so) must inform theory.

1 *The Desire for Physical Security and Political Stability*

The first of these is the human desire for physical security and political stability. Even though these desiderata form the theoretical impetus within social contract theory for individuals to leave the state of nature and give up their natural liberties to a sovereign, the classical liberal outlook nevertheless underestimated these motivations as continuing animating principles for governing human affairs. Rather, the classic liberal philosophers were philosophers of revolution and rebellion. Both Locke and Rousseau set forth philosophies that not only justified but called for the overthrow of governments that usurped or abused the rights of the people. The philosophies of both played an instrumental role in the political transformations of 17th and 18th century England, France, Haiti and the US.

Yet the desire for liberty has never stood far from the desire for security. Concern about the disruptive political effects of liberal natural rights during the time of the English Civil Wars in the 17th century fuelled Thomas Hobbes's arguments that, once formed, the social contract should permit near absolute rule by the sovereign.¹²⁰ The consternation over political disruptiveness also fuelled the theorist of absolute sovereignty, Jean Bodin.¹²¹ Even Kant, writing a century

¹¹⁹ For example, the strain of positivism which derives from the humanist tradition and '*raison d'état*' as expressed, for instance, in the work of Niccolò Machiavelli. There is also a pronounced strain of positivist critique which simply possesses a certain analytical distaste for the normative style of argument. Many of the early positivists, for example, berated the natural law tradition as subject to hypocrisy, aggrandisement and conflation. The same sensibility no doubt has animated contemporary critical theorists. Schmitt's disgust with liberal legality was quite prominent: Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (George Schwab trans, MIT Press, 1985) 14 [trans of *Politische Theologie: Vier Kapitel zur Lehre von der Souveränität* (first published 1922)]. Schmitt's animus was of course undoubtedly also closely connected to his highly conservative social and political commitments, which culminated in his affiliation with the Nazis.

¹²⁰ See David P Gauthier, *The Logic of Leviathan: The Moral and Political Theory of Thomas Hobbes* (Oxford University Press, 1969); F S McNeilly, *The Anatomy of Leviathan: A Critical Study of Hobbes' Argument* (Macmillan, 1968). See also Thomas Hobbes, *Leviathan; Or the Matter, Forme, & Power of a Commonwealth Ecclesiasticall and Civill* (Yale University Press, first published 1651, 2010 ed).

¹²¹ M J Tooley, 'Introduction' in Jean Bodin, *Bodin on Sovereignty: Six Books of the Commonwealth* (M J Tooley trans, Basil Blackwell, 1955) xi–xii [trans of: *Les Six Livres de la République* (first published 1576)]:

after Hobbes, situated squarely within the Enlightenment and aligned with Locke and Rousseau in his assertion of the universal rational individual as the centrepiece of justice, ultimately endorsed the legitimacy of positive law and was, at the very least, equivocal on the right to rebellion.¹²²

The concerns of Bodin, Hobbes and Kant were not merely theoretical. All lived in times of great political turmoil. A preoccupation of the German theorists from Kant onwards was avoiding the Terror that followed the French Revolution.¹²³ Such concerns have informed counter-revolutionary tactics and politics to the present day (current affairs in the Middle East and North Africa come to mind). The point here is not to justify, but rather to observe, this concern.

The reason for this observation is that such concerns in turn provided at least a partial basis for an alternative normative universe that helped to shape both continental social and political theory and international law doctrine. As the 19th century progressed, conceptions of the state in continental jurisprudence distanced themselves from contractarian conceptions that posited individual will as legally and philosophically prior to the state, towards the notions of the state as an organic and historical phenomenon,¹²⁴ with individual will flowing from the state. These latter conceptions provided the foundation for the German ‘historical school’ of jurisprudence and for the development of positivism in international law.¹²⁵ Within international law, the positivist view ascended through jurists of the late 1800s and early 1900s.¹²⁶

In 1562 the long series of the Wars of Religion started ... At this stage of his career, in these circumstances, and in this environment, Bodin composed the *Six books of the Commonwealth* ... Civil war inspired him with a horror of rebellion and the anarchy that comes in its train ... and that the only remedy was the recognition of the absolute authority of the state ...

¹²² See Immanuel Kant, ‘On the Common Saying: “This may be True in Theory, but It Does Not Apply in Practice”’ (H B Nisbet trans) in H S Reiss (ed), *Kant: Political Writings* (Cambridge University Press, 2nd ed, 1991) 61 [trans of: *Über den Gemeinspruch: Das mag in der Theorie richtig sein taugt aber nicht für die Praxis* (first published 1793)]; Lewis W Beck, ‘Kant and the Right of Revolution’ (1971) 32 *Journal of the History of Ideas* 411.

¹²³ For a concise summary of these jurisprudential developments, see Portmann, above n 60.

¹²⁴ G W F Hegel, *Phenomenology of Spirit* (A V Miller trans, Oxford University Press, 1977) [trans of: *Phänomenologie des Geistes* (first published 1807)].

¹²⁵ Portmann, above n 60. The focus on the rootedness of the state within a particular social history found prominent expression in the work of Friedrich Carl von Savigny, whose jurisprudence detailed how that specificity was expressed within national legal systems. Savigny in turn influenced Austin, who brought elements of Savigny’s analysis into his own work and in so doing transmitted the positivist sensibility within classical legal thought to the ‘common law world’: Duncan Kennedy, ‘Three Globalizations of Law and Legal Thought: 1850–2000’ in David M Trubek and Alvaro Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (Cambridge University Press, 2006) 19, 27–8. Continental legal science of the age influenced codifications across the globe as a co-traveller with the ‘first globalization’ enacted by the colonial encounter: at 28.

¹²⁶ The scholarly justification for positivist conceptions of international law arose from the writings of Heinrich Triepel, Dionisio Anzilotti, Lassa Oppenheim and others: Portmann, above n 60, ch 5; Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge University Press, 2002).

2 The Analytics of Power and the Rise of Critical Theory

Over the same period in the 1800s and early 1900s, a critical approach to the same questions and concepts emerged. Karl Marx and Friedrich Nietzsche, for example, each developed sharp reactions to the idealisation of the state and the accompanying moral-political order, exposing underlying workings of power and domination. A reductionist account might hold that Marx's analysis of power produced the historical-materialist critique of capitalism and class that ultimately opposed itself to domination, whereas Nietzsche's analysis led to a very different outcome by calling for an abandonment of moral criticism of domination in favour of a celebration of the will to power.

Both Marxian and Nietzschean critical sensibilities share with the mainstream positivists described above an awareness of the analytical centrality of the social fact of power. Though themselves rather dismissive of the law, Marx and Nietzsche each informed the emergence of 20th century analyses of legality, ranging from the sociology of Max Weber,¹²⁷ to the political theory of Carl Schmitt,¹²⁸ to the Frankfurt School,¹²⁹ to Michel Foucault's demonstration of the

¹²⁷ In the early 20th century, the founding sociologist Max Weber introduced the concept of *Herrschaft* — best translated as 'domination', 'dominion' or 'rule': Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (Fischhoff et al trans, University of California Press, 1978) [trans of: *Wirtschaft und Gesellschaft: Grundriss der verstehenden Soziologie* (first published 1922)]. Elsewhere I've discussed in some detail the question of the proper translation of *Herrschaft*: Chantal Thomas, 'Re-Reading Weber in Law and Development: A Critical Intellectual History of "Good Governance" Reform' (Research Paper No 08-034, Cornell Law School, 9 December 2008) 55-60 <http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1117&context=lsrp_papers>. Though some Anglo-American theorists tried to assimilate Weberian thought into a liberal social contract sensibility, in fact Weber was indifferent to liberal philosophy: see Sven Eliaeson, 'Constitutional Caesarism: Weber's Politics in Their German Context' in Stephen Turner (ed), *Cambridge Companion to Weber* (Cambridge University Press, 2000) 131, 136-7:

For an Anglo-American reader ... [t]he core problem of liberalism is state power: limiting it, controlling it, or alternatively of justifying its positive role, a role which is to be determined by constitutions and by democracy ... Weber, however, was far removed from all of this. ... [N]atural law was alien to Weber, who was ... in favor of what we might call legal positivism — or, maybe better, legal realism ...

Weber was

not concerned with the normative question of whether or not that body of rules ought to be considered legitimate ...

Weber was, in many ways, influenced by both legal positivism and post-Nietzschean skepticism. He was not concerned with the problem of which regimes are normatively legitimate, but with a different question ... 'how can modern regimes legitimate themselves or be held to be legitimate?'

Peter Lassman, 'The Rule of Man over Man: Power, Politics and Legitimation' in Stephen Turner (ed), *Cambridge Companion to Weber* (Cambridge University Press, 2000) 83, 87-8. Weber argued that the Western innovation of 'logically formal rationality' in law — what we might call the rule of law — permitted the rise of capitalism and the stunning material productivity and wealth of industrialization, establishing his famous typology distinguishing non-Western irrational modes of *Herrschaft* from the Western innovation of 'logically formal rationality'. The sociological impulse that undergirds Weberian theory of law is also behind early legal realism as well as contemporary critical legal theories.

¹²⁸ See, eg, Schmitt, above n 119.

¹²⁹ See, eg, Max Horkheimer and Theodor W Adorno, *Dialectic of Enlightenment* (John Cumming trans, Herder and Herder, 1972) [trans of: *Dialektik der Aufklärung* (first published 1944)].

ways in which knowledge is power.¹³⁰ Again, the purpose here is not to rehearse intellectual history, but rather to demonstrate the robust analytics of power that, through the course of the 20th century, stood in juxtaposition to liberalism as a parallel thrust of theorisation about the state and sovereignty. Critical theoretical approaches shared an attention to the exercise of state power not as an instantiation of popular will or democratically legitimate voice but, rather, as an imposition of control for its own sake.

To return to one of the topics this paper has set out to understand, the relationship between sovereignty and migration law and policy, it is not surprising that the critical approach outlined here identified a very different aspect of this topic as salient. Rather than debating the question of whether borders ought to be open, the critical view points to the ways in which borders are closed. The next section shows how this critical view gave rise to discourses of sovereignty as ‘biopower’.

C *Biopower and Its Observers*

From these critical perspectives, the law, the sovereign and the state are defined by their exceptions. For Schmitt, because the exception cannot be fully anticipated or controlled, it cannot be subsumed within the rule and, so, the ‘[s]overeign is he who decides on the exception’, so that the exception is both outside and necessary to the preservation of the juridical order.¹³¹ ‘Only this definition’, Schmitt continues,

can do justice to a *borderline* concept. ... [A] *borderline* concept is not a vague concept, but one pertaining to the outermost sphere. This definition of sovereignty must therefore be associated with a *borderline* case and not with routine. ... [T]he exception is to be understood to refer to a general ... theory of the state, and not merely to ... any emergency decree or state of siege.¹³²

The slippage between Schmitt’s ‘borderline’ conception of the sovereign’s decision on the rule and exception, on the one hand, and the political and territorial boundaries that distinguish citizen from alien, on the other, is self-evident. This rule–exception relationship operates in a binary mode that the citizen–alien, entry/inclusion–exclusion dichotomy exemplifies. The state is defined not only by its exceptions but also by exclusions. Thus, by virtue of its sovereignty and the power to confer citizenship, ‘the state is the only entity able to distinguish friend from enemy’.¹³³

Decisions on exception and exclusion alone do not define the sovereign; so does the enforcement of those decisions carried out through the use of police power. The identification of the state with the legitimate(d) use of coercion or

¹³⁰ See, eg, Foucault, *Discipline and Punish*, above n 14.

¹³¹ Schmitt, above n 119, 5.

¹³² *Ibid* (emphasis added).

¹³³ George Schwab, ‘Introduction’ in Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (George Schwab trans, MIT Press, 1985) xxiv [trans of *Politische Theologie: Vier Kapitel zur Lehre von der Souveränität* (first published 1922)]. See also Alain Badiou, *Being and Event* (Oliver Feltham trans, Continuum, 2006) [trans of: *L’Etre et l’événement* (first published 1988)]; Colin Wright, ‘Event or Exception?: Disentangling Badiou from Schmitt, or, Towards a Politics of the Void’ (2008) 11(2) *Theory & Event* <http://muse.jhu.edu/journals/theory_and_event/v011/11.2.wright.html>.

violence is a common feature of political theory. This critical perspective, however, identifies punishment as the justification for, rather than as justified by, the state. For the purposes of this article, I will quote from a (much) earlier study of these elements, which I called ‘Disciplining Globalization’:

Few [liberal] theorists of the State have looked to the punitive arm of the State as *constitutive* of the State’s authority. Rather, contractarian and civic republican theorists view the punishment of individuals as a *consequence* of State authority. Such theorists see the ability to punish is an indispensable attribute of sovereignty; but that sovereignty has already been established through a ‘social contract’ between the State and its citizen/subject, or as a result of shared civic mores. It is possible, however, to conceptualize punishment as performing a formative role for the State. Rather than punishment flowing from power, power may flow from punishment.

...

By juxtaposing the modern penal State with ... [the] pre-modern style of punishment, Foucault showed how the power-generating function of punishment ... in the modern era ... featured the transformation of punishment from the occasional spectacle to less violent but more sustained controls on the criminal population, through imprisonment. The legal and administrative functions of the modern State combined to form a bureaucracy of punishment. The modern State revamped the technologies of punishment into fine-grained and constant monitoring and control over criminals, establishing a ‘micro-physics’ of power.¹³⁴

Especially in the case of territorial boundaries and the movement of persons across them, these dynamics are heavily inflected by the concern for security and stability. Three aspects of critical attentiveness to the fact of power are worth foregrounding here and all contribute to biopolitical discourse on migration and territorial control. The first aspect is the emphasis on exclusion of foreigners from the state. The second is attention to the punitive role of the state. The third is the role of these dynamics in the age of globalisation.

The idea here would be that liberal legality does not eliminate the drive towards security, control, prohibition, punishment — in other words, power for its own sake. Rather, it mediates and obscures the dynamics of power; domination and control actually shape social relations as well as the

¹³⁴ Chantal Thomas, ‘Disciplining Globalization: International Law, Illegal Trade, and the Case of Narcotics’ (2003) 24 *Michigan Journal of International Law* 549, 572 (emphasis in original), citing Foucault, *Discipline and Punish*, above n 14, 81–2. Foucault attempted to show how the act of exercising direct, ultimate dominion over individual bodies through the administration of punitive sentences secured the state’s authority in a way not possible through any other means. Foucault began by suggesting that, in the pre-modern, monarchic era, public spectacles of punishment-hangings and more gruesome forms of execution generated power by publicly displaying the state’s ultimate control over individual life and death. Foucault wrote, at 81–2:

Throughout the eighteenth century, inside and outside the legal apparatus, in both everyday penal practice and the criticism of institutions, one sees the emergence of a new strategy for the exercise of the power to punish ... to make of the punishment and repression of illegalities a regular function, coextensive with society; not to punish less, but to punish better; to punish with an attenuated severity perhaps, but in order to punish with more universality and necessity; to insert the power to punish more deeply into the social body.

interpretation of legal rules. Exercises of governmental power in the name of the punitive, the disciplinary or the social, are portrayed as ‘abnormal’ exceptions because they interfere with the philosophical integrity of liberalism and with principles of liberal legality.¹³⁵ As a consequence, the presupposition that we live in a constitutional democracy characterised by freedom and equality under the law becomes an ideology of legitimation that disguises the irrationality, the incoherence, the inequality and the brutality that can inhere in legal and social relations. The critical view seeks to destabilise prevailing assurance in the fundamental rationality and fairness of a social and legal structure that may nevertheless sometimes depart (justifiably or unjustifiably).

The opposition of views becomes clear with respect to a question like migration. Within the liberal view (though as we’ve seen this view is contested within liberal discourse by Carens and others), the exclusion or expulsion of aliens can be seen to follow rationally from the terms of the social compact. The critical point of view, however, is attentive to competing and potentially irrational impulses behind exclusionary migration policy.

We have already seen that the analytical transposition of the individual to the state — the turn to thinking of the individual and the state analogically — crucially supported the birth of the modern era through providing the justification for and the definition of sovereignty. The notion of the state as defined by autonomy and entitled to self-preservation was entirely based on the

¹³⁵ Anthony T Kronman, ‘Paternalism and the Law of Contracts’ (1983) 92 *Yale Law Journal* 763, 764–5.

analogy of sovereign states to individuals in the state of nature.¹³⁶ Thus, the justification of state power to serve the ends of self-preservation (both individual and sovereign) can be found in the beginnings of modern political thought.

As with other critical approaches above, Foucault's work

abandon[ed] ... the traditional approach to the problem of power ... based on juridico-institutional models (the definition of sovereignty, the theory of the State), in favor of an unprejudiced analysis of the concrete ways in which power penetrates subjects' very bodies and forms of life.¹³⁷

In his later work, Foucault began to develop these studies and introduced the term 'biopower':

the set of mechanisms through which the basic biological features of the human species become the object of a political strategy, of a general strategy of power, or, in other words, how, starting from the eighteenth century, modern Western societies took on board the fundamental biological fact that human beings are a species.¹³⁸

According to this concept, the symbology of the state as a body fuels the 'explosion of numerous and diverse techniques for achieving the subjugation of

¹³⁶ Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford University Press, 1999) 6–8. For Hobbes, for example, the impulse to self-preservation is what provides the basis for individual membership in the sovereign: Hobbes, above n 120, 81–2. Less well-understood is the importance of self-preservation to the natural law jurisprudence of the same period. The natural law of the early moderns, of whom Grotius is held to be the exemplar, is frequently held as the predecessor to contemporary international law in that it stipulates a planetary commons that imposes constraints on sovereign expansion: H Lauterpacht, 'The Grotian Tradition in International Law' (1946) 1 *British Year Book of International Law* 1, 18–35. (Part III(C) below returns to this history with respect to the rights of foreigners in natural law.) In that sense, Grotius is sometimes placed in line with the medieval scholasticists who established the beginnings of universalist political thought through Catholic theology: see, eg, Thomas Aquinas, *Summa Theologiae, Questions on God* (Brian Davies trans, Cambridge University Press, 2006) [trans of: *Summa Theologiae* (first published 1265–74); Francisco Suarez, *Tractatus de Legibus, ac Deo Legislatore, in Decem Libros Distributus* [Treatise on Laws and Divine Legislation, in 10 Books] (Sumptibus Horatij Cardon, 1612); Francisco de Vitoria, 'On the Indians Lately Discovered' in Ernest Nys (ed), *Francisci de Victoria: De Indis et De ivre belli relectiones* (John Pawley Bate trans, Carnegie Institution, 1917) 115 [trans of: *Relectiones Theologicae XII* (first published 1586)]. Grotius' theoretical innovation — which provided the basis for the beginnings of the era of sovereign statehood typically dated back to the 1648 Peace of Westphalia adopted two decades after his magnum opus, *On the Law of War and Peace*, was published — was to begin to secularise the law of nations: see Hugo Grotius, *On the Law of War and Peace* (A C Campbell trans, Batoche Books, 2001) [trans of: *De Jure Belli ac Pacis* (first published 1625)]. Yet Grotius, the father of international law, in fact shared the concern for self-preservation that animates Hobbesian thought. In his recent intellectual history, *The Rights of War and Peace*, Richard Tuck shows that 'the view taken of Grotius in the conventional histories of international law badly misrepresents his real position': Tuck, above n 136, 108. Tuck attributes this kinder, gentler Grotius to the popularisation of Grotius by Samuel Pufendorf and Christian Wolff: at 142, 187, 195–6. In this sense, the space between Grotius and Hobbes is much narrower than commonly understood and the turn of international law towards absolutist sovereigntism in the name of autonomy can be understood as much more closely related to these natural law roots. The rights of foreigners in Grotian international law, as discussed in Part III(C) below, are similarly based on the rights of foreigners to self-preservation.

¹³⁷ Werner Hamacher and David E Wellberry, 'Introduction' in Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Daniel Heller-Roazen trans, Stanford University Press, 1998) 5 [trans of: *Homo sacer: il potere sovrano e la nuda vita* (first published 1995)].

¹³⁸ Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France 1977–1978* (Graham Burchell trans, Palgrave Macmillan, 2009) 1.

bodies and the control of populations'.¹³⁹ Foucault's focus was on the ways in which modern statecraft had become responsible for all aspects of human life. Distinct from the limited demarcation of the public realm in conceptions of citizenship from classical antiquity, in the modern world the public became responsible for managing and assuring wellbeing from birth to death.

Though Foucault himself did not clearly distinguish biopower and biopolitics,¹⁴⁰ subsequent theorists have proposed

a terminological distinction, suggested by Foucault's writings but not used consistently by him, between biopower and biopolitics, whereby the former could be defined (rather crudely) as the power over life and the latter as the power of life to resist and determine an alternative production of subjectivity.¹⁴¹

The terminology remains uncertain in the literature on biopower, so for the purposes of this article, the terms will be used interchangeably, though the proposed distinction between power and resistance is a useful one.

If biopower involved the management of populations, it certainly involved the management of population movement. Subsequent theorists of biopower have tended to understand it as more unambiguously menacing than did Foucault, whose oeuvre is tonally ambivalent in its descriptions of power and governmentality. Moreover, Foucault's intention is to shed light primarily on the techniques of supporting life and health that arise in modern governance and administration. For this reason, in the typology of modalities of the state that I have established in the larger project, I distinguish between a 'governance' conception of the state, which I would associate with Foucault and others,¹⁴² and a 'domination' conception, which I associate more with some of the biopolitical theorists who followed and adapted from Foucault.

Giorgio Agamben, for example, brought together Foucault's concept of biopower with Schmitt's understanding of the state of exception. For Agamben, the 'fundamental categorical pair of Western politics is not that of friend/enemy but that of bare life/political existence ... exclusion/inclusion'.¹⁴³ It was Agamben who identified the concentration camp as the 'pure, absolute, and

¹³⁹ Michel Foucault, *The History of Sexuality* (Robert Hurley trans, Pantheon Books, 1985) vol 1, 140 [trans of: *Histoire de la sexualité* (first published 1976)].

¹⁴⁰ See Michel Snellart, 'Course Context' in Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France 1977–1978* (Graham Burchell trans, Palgrave Macmillan, 2009) 369, 377.

¹⁴¹ Michael Hardt and Antonio Negri, *Commonwealth* (Harvard University Press, 2009) 57.

¹⁴² Elsewhere I have argued that Foucault's *problematique* is profitably compared to contemporary institutional analysis: see Chantal Thomas, 'Migrant Domestic Workers in Egypt: A Case Study of the Economic Family in Global Context' (2010) 48 *American Journal of Comparative Law* 987, 989 n 7 (citations omitted):

In the study of governance we see a convergence of analytical methods from different parts of the academy: economists such as Douglass North have offered institutional analysis which includes both formal rules and informal norms and ideologies, as well as methods of implementation and enforcement (or lack thereof) by the state and the impact of economic and social forces ... Critical theorists such as Michel Foucault have adopted studies of governmentality which pay close attention both to administrative practices of the state and to forms of knowledge that shape power relations within state and social structures ...

¹⁴³ Hamacher and Wellberry, above n 137, 8.

impassable biopolitical space (insofar as it is founded solely on the state of exception) ... the hidden paradigm of the political space of modernity'.¹⁴⁴

Agamben's disquisition on the camps raises the question of the analogousness of the immigration and refugee detention centres and camps that exist near many, if not most, international borders today.

To be clear, no true comparison can be made to the horrific spectre of Nazi death camps. The purpose of migrant detention is expulsion and exclusion, not extermination and genocide. In this way the comparison fails immediately and dramatically.

Once this clear distinction is made, however, what may bear some consideration is whether immigrant detention centres evoke, if not Agamben's conversion from biopolitics to thanatopolitics in the concentration camps,¹⁴⁵ then in another way the state's power to decide on the exception to social membership and in another way the state's expression of its extreme power over life.

¹⁴⁴ Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Daniel Heller-Roazen trans, Stanford University Press, 1998) 123 [trans of: *Homo sacer: il potere sovrano e la nuda vita* (first published 1995)].

¹⁴⁵ *Ibid* 122–3. Here, Agamben discusses thanatopolitics as follows:

Along with the emergence of biopolitics, we can observe a displacement and gradual expansion beyond the limits of the decision on bare life, in the state of exception, in which sovereignty consisted. ... [T]here is a line in every modern state marking the point at which the decision on life becomes a decision on death, and biopolitics can turn into thanatopolitics ... we shall try to show that certain events that are fundamental for the political history of modernity (such as the declaration of rights), as well as others that seem instead to represent an incomprehensible intrusion of biologico-scientific principles into the political order (such as National Socialist eugenics and its elimination of 'life that is unworthy of being lived,' or the contemporary debate on the normative determination of death criteria), acquire their true sense only if they are brought back to the common biopolitical (or thanatopolitical) context in which they belong.

Photo from: Daphne Eviatar, 'Immigration Detention Doubles Since 1999', *The Washington Independent* (online), 2 December 2009 <<http://washingtonindependent.com/69433/immigrant-detention-doubles-since-1999>>.



Photo from: Human Rights Watch, *US: Immigration Detention Neglects Health; Two Studies — On Women and Systemic Abuses — Document Shortcomings and Lack of Accountability* (17 March 2009) <<http://www.hrw.org/news/2009/03/17/us-immigration-detention-neglects-health>>.



Photo from: Jim Hoft, 'Greece Locks Up Illegal Immigrants in Country's First Detention Camp Prison' on *Gateway Pundit* (29 April 2012) <<http://www.thegatewaypundit.com/2012/04/greece-opens-first-detention-camp-prison-for-illegal-immigrants/>>.



Photo from: Nikolas Georgiou, 'Protest against Immigration Detention Centers — Athens' on *Demotix* (24 April 2012) <<http://www.demotix.com/news/1173394/protest-against-immigrant-detention-centers-athens>>.



The biopolitical protection of the social body through the exclusion of foreign elements invokes the self-preservationist instinctual impulse towards protection of physical security.

In addition to detention centres and camps, the increased fortification of territorial boundaries dramatically exemplifies this impulse. Wendy Brown, in her recent book *Walled States, Waning Sovereignty*, has studied the ‘devotion of unprecedented funds, energies, and technologies to border fortification’.¹⁴⁶ Brown’s examples include not only the well-known examples of the ‘United States-built behemoth along its southern border and the Israeli-built wall snaking through the West Bank’ but ‘many others’ including South Africa’s ‘electrified security barrier on its Zimbabwe border’, Saudi Arabia’s ‘ten-foot high concrete post structure along its border with Yemen, which will be followed by a wall at the Iraq border’, and barriers ‘built by India to wall out Pakistan, Bangladesh, and Burma’.¹⁴⁷

These concerted efforts to concretise security and stability also evoke an immunological conception of the body politic in which outside elements pose existential threats rooted in fears of disease and corruption of physiological purity.¹⁴⁸

In this way biopolitical discourse captures elements of international law and modern statecraft that are either completely unintelligible to liberal politics or understood to be exceptional rather than endemic to human governance. The biopolitical view would be attentive to the ways in which countries are increasing their defences against the threat of migration. These international laws increasing border defences are discussed in the next section.

III A CRITICAL APPROACH TO THE INTERNATIONAL LAW OF MIGRATION

A *Biopower in International Law*

Theories of biopower are reflected by international law in its positivist understanding of sovereignty as grounded in effective territorial and population control. Beyond this foundational concept in general international law, and alongside the growth of an international law establishing rights for migrants, there is a lot of new international law specifically designed to boost state exercise of border control. These international instruments suggest that states have not relinquished sovereign territorial prerogative — they have employed international law to enhance rather than to impede it.

For example, in 2000 the UN promulgated the *Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime* (‘*Migrant Smuggling Protocol*’),¹⁴⁹ requiring states parties to criminalise the transport of migrants

¹⁴⁶ Brown, above n 1, 8.

¹⁴⁷ Ibid.

¹⁴⁸ Roberto Esposito, *Immunitas: The Protection and Negation of Life* (Zakiya Hanafi trans, Polity Press, 2011) [trans of: *Immunitas: protezione e negazione della vita* (first published 2002)]. Thanks to Liz Anker for pointing me in the direction of Roberto Esposito’s work.

¹⁴⁹ *Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime*, opened for signature 15 November 2000, 2241 UNTS 480 (entered into force 28 January 2004) (‘*Migrant Smuggling Protocol*’).

without valid travel documentation and related uses of fraudulent travel documents.¹⁵⁰ The *Migrant Smuggling Protocol* was part of a broader intergovernmental effort establishing multiple treaties at Palermo to prohibit not only ‘migrant smuggling’ but also ‘trafficking in persons’ (through the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime* (‘*Trafficking Protocol*’))¹⁵¹ and organised crime more generally (the *United Nations Convention against Transnational Organized Crime* (‘*Organized Crime Convention*’)).¹⁵² The conceptual distinction between ‘smuggled migrants’ and ‘trafficked persons’ rests on voluntariness: the smuggled migrant is said to have consented to being transported illegally, whereas the trafficked person has encountered fraud, force or some other mode of coercion. In practice, this distinction can be very hard to maintain.¹⁵³

Each of these instruments targeted border control as a goal. They establish bases for coordinating the policing of borders against illegal migrants,¹⁵⁴ by allowing states to extend immigration-related investigations extraterritorially into

¹⁵⁰ Ibid art 6. This establishes as a criminal offense, ‘when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit’, ‘the smuggling of migrants’ and the production, provision, procurement or possession of ‘a fraudulent travel or identity document’ when such acts are ‘committed for the purpose of enabling the smuggling of migrants’.

¹⁵¹ *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, opened for signature 15 November 2000, 2237 UNTS 319 (entered into force 25 December 2003) (‘*Trafficking Protocol*’). Article 5 of the *Trafficking Protocol* requires member states to criminalise the ‘trafficking of persons’ as defined in art 3, with trafficking defined in art 3(a) as:

the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs ...

Article 3(b) specifies that ‘[t]he consent of a victim of trafficking in persons to the intended exploitation [as defined in the *Trafficking Protocol*] shall be irrelevant where any of the means set forth in [the *Trafficking Protocol*] have been used’. The definition of trafficking in the *Trafficking Protocol* has been very controversial, particularly within communities of feminist theorists and women’s rights advocates: see, eg, Janet Halley et al, ‘From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism’ (2006) 29 *Harvard Journal of Law & Gender* 335, 352–8 (section by Chantal Thomas discussing the controversy over the definition of trafficking).

¹⁵² *United Nations Convention against Transnational Organized Crime*, opened for signature 15 November 2000, 2225 UNTS 209 (entered into force 29 September 2003) (‘*Organized Crime Convention*’). For a more detailed account see Chantal Thomas, ‘Undocumented Migrant Workers in a Fragmented International Order’ (2010) 25 *Maryland Journal of International Law* 187.

¹⁵³ See above Part I. For a more detailed discussion, see Halley et al, above n 151.

¹⁵⁴ *Migrant Smuggling Protocol* art 11(1) (‘Without prejudice to international commitments in relation to the free movement of people, States Parties shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect the smuggling of migrants’).

commercial carriers under the control or auspices of other state parties.¹⁵⁵ Both ‘smuggled migrants’ and ‘trafficked persons’ can be returned home by the ‘receiving’ state party, and the ‘sending’ state party must accept them.¹⁵⁶ For its part, the *Organized Crime Convention* establishes detailed guidelines relating to extradition.¹⁵⁷

This regime appears quite robust when compared with other treaty systems. The Palermo instruments have more participating members than multilateral conventions not only on human rights affecting migration, but also on the relevant trade agreements.¹⁵⁸

Because migration flows primarily and most saliently from the global South to the global North, this international law, as I have argued elsewhere,

has the effect of throwing a shadow of suspicion over entire regions of the world that are viewed thereafter as suppliers of criminality ... [G]lobalization seems to

¹⁵⁵ Ibid; *Trafficking Protocol* art 11(3) (extending obligation to strengthen border controls to ‘commercial carriers’ by requiring ‘commercial carriers ... to ascertain that all passengers are in possession of the travel documents required for entry into the receiving State’). See also *Migrant Smuggling Protocol* art 8 (encouragement of cooperation with investigation of sea vessels).

¹⁵⁶ See, eg, *Migrant Smuggling Protocol* art 18(1):

Each State Party agrees to facilitate and accept, without undue or unreasonable delay, the return of a person who has been the object of conduct set forth in article 6 of this *Protocol* and who is its national or who has the right of permanent residence in its territory at the time of return.

Trafficking Protocol art 8(1):

The State Party of which a victim of trafficking in persons is a national or in which the person had the right of permanent residence at the time of entry into the territory of the receiving State Party shall facilitate and accept, with due regard for the safety of that person, the return of that person without undue or unreasonable delay.

¹⁵⁷ See, eg, *Organized Crime Convention* art 16(10):

A State Party in whose territory an alleged offender is found, if it does not extradite such person ... shall, at the request of the State Party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution.

See also art 18 (defining mutual legal assistance for extradition and prosecution).

¹⁵⁸ See Part II(A)(4) above for the migrant human rights treaties and their ratifications. The Palermo instruments have upwards of 100 signatories each. Although all World Trade Organization members are formally signatories to the *General Agreement on Trade in Services* (‘GATS’), the fact that GATS principles apply only to those sectors for which members have actively made concessions, and the fact that only a minority of members have made such concessions, effectively means the level of participation is low: Julia Nielson, ‘Service Providers on the Move: A Closer Look at Labour Mobility and GATS’ (Report No TD/TC/WP(2001)26/FINAL, Trade Directorate, Organisation for Economic Co-Operation and Development, 20 February 2002) 30 (stating that the ratio of full liberalisation in Mode 4 market access ranges from 0 to 4 per cent, compared with 18–59 per cent in Mode 1 (cross-border, such as e-commerce), 24–69 per cent in Mode 2 (consumption abroad, such as foreign outpatients) and 0–31 per cent in Mode 3 (commercial presence, such as foreign subsidiaries)). See also *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1995) annex 1B (‘*General Agreement on Trade in Services*’). Within the relatively weak division of trade in services, those provisions governing migrant (temporary) labour are the weakest and most qualified. Substantively, the rules formally exclude unauthorised labour from their purview, as well as those sectors in which undocumented migrant workers are likely to work: Thomas, ‘Undocumented Migrant Workers’, above n 152, 197–8. The practical effect of the trade regime is to confer the privileges of liberalisation only to high-skilled workers.

be twinned with increasing border paranoia ... [that] openness to, and presence of, aliens contaminates the national body ...

[T]he [Palermo] conventions' harmonization and coordination of criminal enforcement, extension of techniques such as extradition and information-sharing amongst states, and assurance of the repatriation of offending migrant bodies, can all be seen as instances of biopower.¹⁵⁹

The post-2001 tightening of connections between illegal markets and terrorism perhaps represents a further extension of this phenomenon. In this [ultra-paranoid] imaginary, every migrant entrant — and particularly those who are unauthorized — potentially harbors ... criminal ... intentions.¹⁶⁰

B *The Instabilities of International Legal Discourse*

What to make of these techniques of border control, of biopower? For a number of theorists, these measures, counterintuitively, signal the demise, rather than the rise, of the modern nation-state. Increasingly militaristic biopower, even where successfully deployed, betrays increasing desperation in the face of overarching declines in territorial control by the traditional nation-state.

For Agamben, it is the fact that 'the great State structures have entered into a process of dissolution' that has caused 'the emergency ... [to] become the rule'.¹⁶¹ *State of Exception*, written in reaction to the 2003 US invasion of Iraq, utters in alarm that this dissolution has produced a martial global order.¹⁶² Brown also identifies 'waning sovereignty' as a cause of ramped-up border control, 'manifest, inter alia, in the building of walls ... hypersovereignty ... is actually often compensating for its loss'.¹⁶³

These narratives form an ominous mirror image to Benhabib's cosmopolitan prophecy, cited in Parts I and II(A) of this article, in which she argues that the emerging 'rights of others' accorded to non-citizens in democratic societies point the way to a 'worldwide civil society'.¹⁶⁴ It is striking that, in the very same period of time over the turn of the 20th into the 21st century, these two very different accounts, standing at opposing poles of theorising about sovereignty, nevertheless each embrace a temporal linearity to describe the global order. For

¹⁵⁹ Thomas, 'Undocumented Migrant Workers', above n 152, 211–13.

¹⁶⁰ Ibid 213.

¹⁶¹ Hamacher and Wellberry, above n 137, 12.

¹⁶² Giorgio Agamben, *State of Exception* (Kevin Attell trans, University of Chicago Press, 2005) 86 [trans of: *Stato di eccezione* (first published 2003)]:

The state of exception is the device that must ultimately articulate and hold together the two aspects of the juridico-political machine by instituting a threshold of undecidability ... As long as the two elements remain ... distinct ... their dialectic — though founded on a fiction — can nevertheless function in some way. But when ... the state of exception, in which they are bound and blurred together, becomes the rule, then the juridico-political system transforms itself into a killing machine.

...

The aim of this investigation — in the urgency of the state of exception 'in which we live' — was to bring to light the fiction that governs this *arcanum imperii* [secret of power] par excellence of our time.

¹⁶³ Brown, above n 1, 67.

¹⁶⁴ Benhabib, *Another Cosmopolitanism*, above n 1, 16.

Benhabib, the growth of migrant rights indicates evolution towards cosmopolitan society. For Agamben, events point in the opposite direction, towards a devolution into totalitarianism. Both Agamben and Benhabib see the traditional state structure in its death throes, the border crackdowns are merely spasms of its final moments: for Benhabib, heaven (in the form of cosmopolitan utopia) ensues; for Agamben, hell.

This polemical characterisation of course oversimplifies such sophisticated thinkers. Benhabib, for example, does not foresee that evolution will be smooth — rather, it will involve constant disruptions and contestations. Nevertheless, these moments in her view do constitute ‘democratic iterations’ that will ultimately pave the way for progress.¹⁶⁵ My exaggeration has a purpose, though, which is to highlight the contrast in technique between critical legal theory and both of these accounts. Critical legal theory distances itself from both evolutionary and devolutionary claims: rather, the complex of rules, institutions and practices governing the international legal order is constantly subjected to ‘ascending’ and ‘descending’ structures of argument.¹⁶⁶

At the core of the critical legal analytical framework lies a premise that our social worlds — our collective and individual selves — are riven by competing human impulses, the ‘opposed rhetorical modes’ of ‘individualism and altruism’.¹⁶⁷ Through the particulars of legal history and social context, these impulses have created a jurisprudence that houses both dynamics. The interplay of rule and exception in the form and substance of legal doctrine, as a product of our making, can do no more than give effect to these conflicts.

As a consequence, the law always contains within itself multiple avenues of interpretation. That is, the outcomes of legal processes are, necessarily, indeterminate. The diagnosis of indeterminacy has caused many to charge critical theory with nihilism, given that it endorses no grand narrative of progress.¹⁶⁸ Yet it should be clear from the foregoing that critical theory also does not espouse a vision of grand demise. The contingency inherent in laws and institutions also provide opportunities for resistance.¹⁶⁹

Given this, a critical legal understanding of the international law of migration might see sovereignty not as ‘waning’, but rather ‘fracturing’, as Brown herself ultimately concludes.¹⁷⁰ In any case, critical legal analysis would ask a different question: not whether sovereignty is increasing or decreasing, but how it is changing; how it mediates and is mediated by ‘opposed modes’ in legal discourse.

To conduct a thorough-going analysis of these techniques of mediation in the context of migration law lies beyond the scope of this essay but, for example: the law of trafficking in persons seeks to aid victims of trafficking but also potentially to further criminal law enforcement at their expense. The treaties on

¹⁶⁵ Benhabib, *Rights of Others*, above n 9, ch 5.

¹⁶⁶ Koskenniemi, *From Apology to Utopia*, above n 62.

¹⁶⁷ Duncan Kennedy, ‘Form and Substance in Private Law Adjudication’ (1976) 89 *Harvard Law Review* 1685, 1685.

¹⁶⁸ See, eg, Owen M Fiss, ‘The Death of the Law?’ (1986) 72 *Cornell Law Review* 1.

¹⁶⁹ Luis Eslava and Sundhya Pahuja, ‘Between Resistance and Reform: TWAIL and the Universality of International Law’ (2011) 3 *Trade, Law and Development* 103.

¹⁷⁰ Brown, above n 1, 67.

the rights of migrant workers establish protections but also limitations;¹⁷¹ they establish constraints on sovereign prerogative but also exhort its enhancement.¹⁷² The ILC's *Draft Articles on the Expulsion of Aliens* establish minimum standards for the treatment of aliens, but in the service of assisting in their territorial expulsion as a consequence of state will. These instruments — after all products of interstate agreement — simultaneously express concern for the wellbeing of migrants and then reaffirm the importance of sovereignty.

Legal critique interests itself not only in detailing the particulars of these dynamics of mediation, but also in revealing the ways in which they amount to a legitimation of the status quo, stymying awareness of demands for and possibilities of social justice. Hence, the emerging international law of migration may legitimate broader practices of border control, despite or because of its establishment of limited rights against sovereignty.

The right to family life offers a potentially interesting case study in this regard, which this article can only briefly identify as a possible topic for future research. Family reunification has proved to be one of the most effective bases for according migrant rights.¹⁷³ At first glance, this appears to be a straightforward constraint on state immigration policy. Some biopolitical theorists, however, suggest that allowing a limited right to family not only legitimates systemically exclusionary policy, but in the process maintains control of a social imaginary which is, in an era of globalisation, dangerously unstable in its potential for cosmopolitanism. Re-emphasising the primacy of family within state and international legal structures fills political space which might otherwise potentially be open to more transformative (re)imaginings of personal and social relationships: filiation displaces potential affiliation.¹⁷⁴ In this way, recognising family claims may provide effective techniques for mediating broader assertions against the prerogative of the state.¹⁷⁵

¹⁷¹ Compare *Convention on Migrant Workers* pt III (establishing rights for all migrant workers) with pt IV (establishing rights for 'regular' workers).

¹⁷² See, eg, *ILO Migrant Workers (Supplementary Provisions) Convention* art 3 (obliging states parties to adopt 'all necessary and appropriate measures' to suppress illegal movement and employment of migrants).

¹⁷³ See Thomas, 'Convergences and Divergences', above n 41.

¹⁷⁴ Hardt and Negri, above n 141, 160–1:

The family is perhaps the primary institution in contemporary society for mobilizing the common ... but at the same time corrupts it by imposing a series of hierarchies, restrictions, exclusions, and distortions. First, the family is a machine of gender normativity ...

Second, the family functions in the social imaginary as the sole paradigm for relationships of intimacy and solidarity ...

Third, although the family pretends to extend desires and interests beyond the individual toward the community, it unleashes some of the most extreme forms of narcissism and individualism.

...

Finally, the family corrupts the common by serving as a core institution for the accumulation and transfer of private property.

¹⁷⁵ I am deeply indebted to the Up against Family Law Exceptionalism project, founded by Brenda Cossman, Janet Halley and Kerry Rittich.

C *Historicising International Law*

In addition to revealing ambiguities in contemporary international migration law, detachment from linear or evolutionary accounts of international law also opens the way towards recovering trans-historical ambiguities.¹⁷⁶

For example, the position articulated by contemporary human rights bodies approaches much more closely that of the natural law theorists of the early modern period, over and against the high positivism of the late 19th century.¹⁷⁷ The early natural law jurists limited rights of governments against the idea of a world granted to mankind in common¹⁷⁸ and these limitations extended to the rights of foreigners in several instances. The ‘father of international law’, Hugo Grotius, for example, noted several rights related to the passage, trade and residence of aliens.¹⁷⁹

Before we international lawyers congratulate ourselves regarding the progressive roots of international law, however, the colonial dimension of those traditions should be clarified. Recently, historians of international law have pointed out that the Grotian insistence on the commons formed the predicate for legal arguments that he crafted as counsel retained by the Dutch East India Company.¹⁸⁰ The portrayal of Grotius as a pacific international idealist is belied by his actual historical role in advocating privateering violence on the high seas.

Accordingly, critical international legal theorists would caution against dismissing such past imperialisms as exceptional to a larger narrative of progress towards peaceful global order. To recall tenets of critical theory from Part III above, the exception cannot be extricated from the rule and the contours of

¹⁷⁶ See Bonnie Honig, ‘Another Cosmopolitanism?: Law and Politics in the New Europe’ in Seyla Benhabib, *Another Cosmopolitanism* (Oxford University Press, 2006) 102, 112 (arguing that evolutionary time obscures from view the fact that aliens did in previous times actually have more rights than today).

¹⁷⁷ See, eg, de Vitoria, above n 136, 151:

‘What natural reason has established among all nations is called the *jus gentium*.’ For congruently herewith, it is reckoned among all nations inhumane to treat visitors and foreigners badly without some special cause, while, on the other hand, it is humane and correct to treat visitors well; but the case would be different, if the foreigners were to misbehave when visiting other nations.

Secondly, it was permissible from the beginning of the world (when everything was in common) for any one to set forth and travel wheresoever he would. Now this was not taken away by the division of property, for it was never the intention of peoples to destroy by that division the reciprocity and common user which prevailed among men ...

¹⁷⁸ Grotius, above n 136, 72: ‘All things ... formed a common stock for all mankind, as the inheritors of one general patrimony’. From this commons much of the world has since been converted to private property, but certain rights cannot ‘be reduced to a state of private property’.

¹⁷⁹ *Ibid* 81:

It is upon the same foundation of common right, that a free passage through countries, rivers, or over any part of the sea ... ought to be allowed to those, who require it for the necessary occasions of life; whether those occasions be in quest of settlements, after being driven from their own country, or to trade with a remote nation ...

¹⁸⁰ See, eg, Ileana M Porras, ‘Constructing International Law in the East Indian Seas: Property, Sovereignty, Commerce and War in Hugo Grotius’ *de Iure Praedae* — The Law of Prize and Booty, or “On How to Distinguish Merchants from Pirates” (2006) 31 *Brooklyn Journal of International Law* 741.

exceptions and rules are not incidental to but, rather, reveal larger structures of power. Just as the principle of sovereignty emerged out of the colonial encounter, serving to identify those territories that are available for conquest,¹⁸¹ the seemingly opposite principle of the global commons exerted its own imperial reach.

The postcolonial or 'Third World Approaches to International Law' analysis directs us, then, to the background conditions against which rules and exceptions operate. Attention to such dynamics throws open a world-systemic¹⁸² assessment of the interplay, within this emerging international law of migration, of rule versus exception, of sovereign prerogative versus individual rights, of liberalism versus criminalisation.

The first observation that would result from such a worldview would be that migration from the global South to the global North cannot be divorced from the larger dynamics of globalisation in both its modern forms and its historical forms. The current era is not 'the' era of globalisation but rather one of many. Historically, the waves of colonialism and settlerism that advanced the early modern Western economic expansion must be seen as prior globalisations (as would, of course, earlier patterns of world trade and tribute) and as such prior eras of not only global trade expansion but also of global migrations.

It is worth noting here that current global migration levels from the global South to the global North still have not reached the levels of emigration and immigration, as a percentage of population, that accompanied earlier eras. Emigration to the colonies and the New World provided a crucial conduit during Western Europe's industrial expansion. The late 19th century and early 20th century bore witness to a monumental exodus of immigrants from Europe to the rest of the globe. At the turn of the 20th century, European immigrants streamed to the relatively young 'New World' countries that remain high-immigration destinations to this day — Australia, Canada, New Zealand and the US — as well as to colonial territories yet to become independent. Measured either as a percentage of the total population, or in terms of economic significance, the impact of the earlier wave of immigration was much greater than the present one.¹⁸³ This becomes evident when it is considered, for example, that migration into the US in 1910 and 2010 reached roughly the same levels in

¹⁸¹ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2005).

¹⁸² Immanuel Wallerstein, *The Modern World-System: Capitalist Agriculture and the Origins of the European World-Economy in the Sixteenth Century* (Academic Press, 1974).

¹⁸³ According to Harvard economist Jeffrey G Williamson, the percentage of foreign-born members of 'New World' populations was much higher in the late 19th century than in the 20th century, including Australia (a decline from 46.5 per cent to 23.6 per cent between 1870–71 and 2000–01); NZ (63.5 per cent to 19.5 per cent); and the US (14.4 per cent to 11.1 per cent). A slight exception is Canada (16.5 per cent to 17.4 per cent): Jeffrey G Williamson, 'Global Migration' (2006) 43(3) *Finance & Development* 23, 26 (Table 1). Williamson further observes that these 'absolute numbers' are 'similar to those of a century earlier but ... smaller relative to the population and labor force that had to absorb them': at 25. Of course, the contemporary surge has taken place in a noticeably more 'hostile policy environment. Before World War I, most mass migrations took place without visas, quotas, asylum status, smuggled illegals, or security barriers': at 26. See also Jeffrey G Williamson and Timothy J Hatton, *Global Migration and the World Economy: Two Centuries of Policy and Performance* (MIT Press, 2005).

terms of absolute numbers,¹⁸⁴ even though the overall output of the economy was of course much smaller a century ago.

The socio-economic linkages forged in these prior waves of globalisation, through to the present era, importantly determine current propellers of migration. Numerous commentators have observed that immigration tends to reflect economic and political connections crafted by the governments and investors of the global North.¹⁸⁵ This is for a variety of reasons, including dislocation of local economic production through the introduction of imports; the establishment of communication and transportation networks supporting trade and investment; and the sociocultural reorientation accompanying these new arrangements. Finally, the disruption that accompanied military occupation of or intervention into these domains in the service of Northern geo-strategic aims produced its own 'harvest of empire'.¹⁸⁶

In many cases, migration patterns reflect explicit economic arrangements of prior eras, even when those arrangements are no longer formally in force. Governments of the global North made guest worker arrangements within their spheres of influence: the Bracero Program of the US to procure Mexican workers;¹⁸⁷ the guest worker arrangements between the Turkish and German governments;¹⁸⁸ and those between French North Africa and France both during and after formal French colonial rule.¹⁸⁹

Even apart from these critical considerations of political economy, the logic of certain theorems in classic liberal economics predicts migration as a consequence of economic globalisation. The factor price equalisation theorem states that open trade between economies will tend to equalise disparities in 'factor' prices. Though the conception of labour as a commodity is deeply and frontally contested by labour justice advocates,¹⁹⁰ economists nevertheless understand labour as one of the key factors of production. Consequently, one would expect to see flows of labour in addition to commodities and capital.

Labour mobility and capital mobility complicate and at least partially refute the 'Heckscher-Ohlin' theory of factor complementarity in which countries will focus on comparative advantages in factor endowments, with capital-intensive production flowing to capital-rich economies and labour-intensive production flowing to labour-rich economies.¹⁹¹ While the Heckscher-Ohlin theorem is partially factual, its grasp is badly weakened by its assumption that labour and

¹⁸⁴ Office of Immigration Statistics, United States Department of Homeland Security, '2010 Yearbook of Immigration Statistics' (Yearbook, August 2011) 5.

¹⁸⁵ See, eg, Saskia Sassen, *The Mobility of Labor and Capital: A Study in International Investment and Labor Flow* (Cambridge University Press, 1988).

¹⁸⁶ Juan Gonzalez, *Harvest of Empire: A History of Latinos in the United States* (Penguin Books, 2000).

¹⁸⁷ Deborah Cohen, *Braceros: Migrant Citizens and Transnational Subjects in the Postwar United States and Mexico* (University of North Carolina Press, 2011).

¹⁸⁸ Nermin Abadan-Unat, *Turks in Europe: From Guest Worker to Transnational Citizen* (Bergan Books, 2011).

¹⁸⁹ Mary Dewhurst Lewis, *The Boundaries of the Republic: Migrant Rights and the Limits of Universalism in France, 1918–1940* (Stanford University Press, 2007).

¹⁹⁰ *Constitution of the International Labour Organization*, annex ('Declaration concerning the Aims and Purposes of the International Labour Organization') art I(a) ('labour is not a commodity').

¹⁹¹ See Bertil Ohlin, *Interregional and International Trade* (Harvard University Press, 1933).

capital do not move between countries. The logic behind this theory was influential in arguing for the adoption of international trade liberalisation agreements, with the idea being that trade liberalisation could substitute for, and therefore prevent, labour migration between rich and poor countries. As I have previously argued, this perspective seriously misperceived the extent to which such labour mobility not only already existed as a consequence of the web of social, economic, historical, military and political factors but, also, the extent to which it would inevitably accompany further economic liberalisation.¹⁹²

Indeed, migration has now been identified as a major component of development strategy for poor countries. In many developing countries, remittances amount to a significant proportion of foreign exchange and a significant source of national revenue. The various actors in global governance frameworks have been attempting to consolidate a policy discourse around 'migration and development' and to identify it as a legitimate focus of attention for the international community. Yet at the same time, as the sections above demonstrated, significant controls on international migration continue.

This gap between what global migration is permitted and what actually transpires is reflected in 'illegal markets' for labour. In this way, the global flows of unauthorised labour migration form one component of what I have dubbed elsewhere the 'dark side of globalization':

Call these illicit markets the dark side of globalization. On globalization's 'bright side,' trade facilitated by multilaterally coordinated market rules yields aggregate welfare gains. On this dark side, in law's shadow, massive disparities between (poor) 'sending' and (rich) 'receiving' countries combine with sophisticated technologies of production and distribution to produce volatile dynamics of supply and demand.¹⁹³

Given the global nature of the problem, it is unsurprising that international law has arisen to stanch the flow through interstate coordination. Such coordination has produced a paradoxical historical moment, which Peter Andreas has dubbed 'open markets, closed border'.¹⁹⁴ That is, as I have said elsewhere, 'at the same time that states have coordinated to create "borderless economies" in legal goods and services, they are coordinating to police their borders against illegal goods and services'.¹⁹⁵

Considering again the historical dimension, this market illegality constitutes one important difference between 'then' and 'now'. During the colonial and settler era, obviously, contemporary regimes of immigration control were not in place. The mass emigrations from the Old World were not subject to visa

¹⁹² Thomas, 'Economic Globalization in Mexico', above n 23.

¹⁹³ Thomas, 'Undocumented Migrant Workers', above n 152, 188–9 (citations omitted).

¹⁹⁴ Peter Andreas, 'US–Mexico: Open Markets, Closed Borders' (1996) 103 *Foreign Policy* 51.

¹⁹⁵ Chantal Thomas, 'Undocumented Migrant Workers', above n 152, 189. Inspiration for this formulation came from Moisés Naim, 'The Fourth Annual Grotius Lecture: Five Wars of Globalization' (2002) 18 *American University International Law Review* 1; David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton University Press, 2004); Curtis J Milhaupt and Mark D West, 'The Dark Side of Private Ordering: An Institutional and Empirical Analysis of Organized Crime' (2000) 67 *University of Chicago Law Review* 41. See also Peter Andreas and Ethan Nadelmann, *Policing the Globe: Criminalization and Crime Control in International Relations* (Oxford University Press, 2006).

requirements in the receiving territories. Indeed, modern systems of immigration control are recent, dating only to the early 20th century.

Historical relationships of global structural political and economic inequality between the global North and South established the initial parameters within which migration patterns unfolded and continue to enable and propel migration patterns today. They also, however, are reflected in the fact that labour emigration of today, from the global South, is much more heavily controlled and subject to regulation and criminalisation than were earlier emigration waves from the global North. This tension between the desperately needed remittances and currency that migrants from developing countries provide — and the regulatory controls put in place nationally and internationally that affect primarily these same migrant populations from developing countries — exemplifies a larger interplay between liberalisation and criminalisation, open trade and closed borders, individual freedom and territorial prerogative that cannot adequately be understood without employing critical historical analysis.

IV TOWARDS REFRAMING DISCOURSE: AN ETHICS OF ‘NEW ORGANICISM’?

Limits on territorial prerogative do not necessarily change the premise of state responsibility or the primacy of states in the international system. There may well be consequentialist reasons for maintaining states as ‘principal duty-bearers’: these include their ‘capacity to give proper recognition to complex corporate goals’ and the ‘longevity of states’ serving as a ‘principal mechanism for the transmission of the accrued rights of human communities over time ... not only of their boundaries and jurisdiction but also of their obligations’.¹⁹⁶ Nor do such limits challenge the general principle of territorial integrity, any more than the boundaries of cities or provinces are challenged by freedom of movement of persons across them.¹⁹⁷ They do, however, add to the complex of responsibilities that states currently bear as members of the contemporary international community.

What should those responsibilities be? A lucid description of the dilemma for

¹⁹⁶ James Crawford and Jeremy Watkins, ‘International Responsibility’ in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press, 2010) 283, 291–2.

¹⁹⁷ See Jacqueline Stevens, ‘Citizenship to Go’, *The New York Times* (online), 17 May 2012 <http://www.nytimes.com/2012/05/18/opinion/citizenship-to-go.html?_r=0>:

Instead of using birth for assigning citizenship, why not keep the boundaries of current countries, open the borders, and use residence to define citizenship, as the 50 states do? Free movement of people in the United States does not diminish the authority of states in our federal system, or the right to participate politically as a citizen of one state and not another. Nor did it lead to the citizens of Georgia moving en masse to Massachusetts.

...

We need governments, but we don’t need nations. People should be free to move across borders; they should be citizens of the states where they happen to reside — period.

See also Jacqueline Stevens, *States Without Nations: Citizenship for Mortals* (Columbia University Press, 2010).

political theory is offered by Arash Abizadeh:

It is clear that the state's exercise of political power is ultimately backed by coercion. ... The question is how the exercise of political power could be reconciled with a vision of human beings at the normative core of both liberalism and democratic theory ... as inherently *free* and *equal*.¹⁹⁸

In this section, I want to explore — really, no more than to make a preliminary sketch — the question of how to arrive at a general ethical position on this issue in an age in which we can and must see beyond borders — how to re-imagine, in Anthony Appiah's words, the 'conceptual questions that lie beneath the facts of globalization'.¹⁹⁹

A number of US legal scholars, among them Kevin Johnson, Cristina Rodríguez and Joel Trachtman, have made compelling cases for opening borders to migration. Most immediately, Johnson has pointed to the moral obligation to redress and reduce the brutality and lethality of draconian border policing.²⁰⁰ At the same time, Rodríguez has cautioned against a highly moralistic approach to immigration policy, especially pertaining to policy towards migrants who have crossed the border without authorisation. Because they have broken the law by virtue of unauthorised entry, Rodríguez argues, 'the fit between the civil rights paradigm and the case of the unauthorized immigrant remains an uneasy one'.²⁰¹ Rodríguez argues instead for a 'framework of mutual benefit [that] is fundamentally pragmatic and highlights the social gains that would accrue from the adoption of particular immigration policies'.²⁰²

Many of the pragmatic social gains that Rodríguez contemplates are economic. There is a great deal of research that supports the view (though not without contest) that immigration produces a net benefit for both receiving and sending countries. In terms of prevailing economic policy, liberalising migration policy would achieve greater consistency with — or at least remove hypocrisy regarding — professed governmental commitments to economic liberalism, as both Johnson's and Trachtman's work suggests.²⁰³

The economic argument is often precisely the concern for progressives, however, who see 'the nightmarish prospect of a labor glut in wealthy countries, the global lowering of wages, and capitalism run amok'.²⁰⁴ However, no less an authority than US Supreme Court Justice Breyer has pointed out that immigration controls, far from shoring up the economic prospects of the citizenry, only exacerbate the economic race to the bottom by straining the bargaining power of both documented and undocumented workers and

¹⁹⁸ Abizadeh, 'Democratic Theory and Border Coercion', above n 90, 39 (emphasis in original).

¹⁹⁹ Kwame Anthony Appiah, *Cosmopolitanism: Ethics in a World of Strangers* (W W Norton, 2006) xx.

²⁰⁰ Kevin R Johnson, 'Opening the Floodgates: Why America Needs to Rethink Its Borders and Immigration Laws' (2008) 61 *SMU Law Review* 3, 4. See also David Weissbrodt, *The Human Rights of Non-Citizens* (Oxford University Press, 2008).

²⁰¹ Cristina M Rodríguez, 'Immigration and the Civil Rights Agenda' (2010) 6 *Stanford Journal of Civil Rights & Civil Liberties* 125, 130.

²⁰² *Ibid* 132–3.

²⁰³ Johnson, above n 200, 4–5; Joel P Trachtman, *The International Economic Law of Migration: Toward the Fourth Freedom* (W E Upjohn Institute Press, 2009).

²⁰⁴ Stevens, 'Citizenship to Go', above n 197.

enhancing the ability of employers to abuse workers with ‘impunity’.²⁰⁵ There is a strong labour and social justice argument for opening borders in order to assist in the process of equalising labour conditions and enhancing the potential for both local and transnational worker organisation.

The necessity of reducing cruelty in border policing, the economic argument and the argument for labour justice all provide important ethical bases for rethinking migration policy. Yet in some ways each of these still seems limited. The first, however vital, still ultimately amounts to a response of compassion or mercy — a waiver — similar to the distinction between excuse and justification. The latter two, focusing on the economic issue from different perspectives, run into the problem that, as Jennifer Gordon puts it, ‘people are not bananas’.²⁰⁶ Gordon elaborates, ‘the flow of human beings has political, cultural, social, and economic effects that differ from the flow of money and goods’,²⁰⁷ so that ‘immigration generates a more complex set of anxieties and political reactions ... than do inflows of either goods or capital’.²⁰⁸ As a consequence, a more robust ethics towards the outside ‘world of strangers’ would seem necessary to respond fully to the ‘anxieties and political reactions’ that accompany the prospect of threatened nationhood.²⁰⁹

Benhabib, Appiah, and other theoreticians have adopted cosmopolitanism as the solution, which Appiah defines as resting on two ideas:

that we have obligations to others ... that stretch beyond those to whom we are related by the ties of kith and kind, or the even more formal ties of a shared citizenship ... [and] that we take seriously the value not just of human life but of particular human lives ...²¹⁰

The foundational modern cosmopolitan, Kant, envisioned a perpetual peace based on a federation of free states and conditions of ‘universal hospitality’.²¹¹ For Kant, hospitality meant the right ‘of a stranger entering foreign territory to be treated by its owner without hostility’, though this right fell short of world citizenship but essentially amounted to a ‘temporary right of sojourn’.²¹²

Contemporary theorists, as described in Part II above, have adapted cosmopolitanism to address questions of sovereignty and migration. Benhabib has argued that cosmopolitanism today amounts to an even more robust position towards ‘the rights of others’. For Benhabib, we are already and inevitably involved in contestations over these rights that, through a process of democratic iterations, will lead towards the realisation of the cosmopolitan ideal.

²⁰⁵ *Hoffman Plastic Compounds Inc v National Labor Relations Board*, 535 US 137, 155 (2002). Breyer J, with whom Stevens, Souter and Ginsburg JJ agreed, was dissenting against the majority decision to overturn the Board and appellate court decisions awarding back pay to undocumented workers for labour law violations related to the right to organise.

²⁰⁶ Jennifer Gordon, ‘People Are Not Bananas: How Immigration Differs from Trade’ (2010) 104 *Northwestern University Law Review* 1109.

²⁰⁷ *Ibid* 1110.

²⁰⁸ *Ibid* 1132.

²⁰⁹ Jacqueline Stevens has analysed this fear as fundamentally rooted in the equation of nationhood with immortality: Stevens, *States without Nations*, above n 197.

²¹⁰ Appiah, above n 199, xv.

²¹¹ Kant, above n 66, 137.

²¹² *Ibid*. Thanks to Tony Anghie for illuminating discussions regarding Kant’s right of hospitality.

Yet others have noted that cosmopolitanism contains qualities that, though admirable, are linked to important philosophical limitations. Among these are what Arjun Appadurai calls ‘trajectorism’, an

epistemological and ontological habit, which always assumes that there is a cumulative journey from here to there, more exactly from now to then ... the idea that time’s arrow inevitably has a telos, and in that telos are to be found significant patterns of change, process and history.²¹³

A number of scholars have therefore sought to articulate alternative theories of justice and identity that, while sharing important intuitions with cosmopolitanism, consciously avoid some of its epistemological ties to classic modernity, that is to say, of linear and rationalistic futurism and universalism. Bonnie Honig has proposed ‘an alternative to Benhabib’s neo-Kantian cosmopolitanism. ... Cosmopolitics’.²¹⁴ Similarly, Ulrich Beck has defined this alternative as ‘cosmopolitization’ rather than cosmopolitanism, with the focus not on a globalising time horizon but rather ‘enmeshment with the cultural Other’.²¹⁵

These and other theories share an ontological respect for difference and a pronounced effort to spurn trajectorist thinking in favour of an appreciation for the creative and protean possibilities of the present. Michael Hardt and Antonio Negri, for their part, have focused on the idea of the ‘multitude’:

a form of political organization that, on the one hand, emphasizes the multiplicity of the social singularities in struggle and, on the other, seeks to coordinate their common actions and maintain their equality in horizontal organizational structures.²¹⁶

Like ‘the people,’ the multitude is the result of a process of political constitution, although, whereas the people is formed as a unity by a hegemonic power standing above the plural social field, the multitude is formed through articulations on the plane of immanence without hegemony.²¹⁷

Similarly, Ernesto Laclau and Chantal Mouffe argue for a ‘radical democratic pluralism’.²¹⁸ William Connolly ‘embrace[s] a story of becoming linked to experimental intervention in a world that exceeds human powers of attunement,

²¹³ Arjun Appadurai, ‘Thinking Beyond Trajectorism’ in Michael Heinlein et al (eds), *Futures of Modernity: Challenges for Cosmopolitical Thought and Practice* (Transcript, 2012) 25, 26.

²¹⁴ Bonnie Honig, above n 176, 105, citing Pheng Cheah and Bruce Robbins (eds), *Cosmopolitics: Thinking and Feeling beyond the Nation* (University of Minnesota Press, 1998). See also Jacques Derrida, *On Hospitality: Anne Dufourmantelle Invites Jacques Derrida to Respond* (Rachel Bowlby trans, Stanford University Press, 2000) [trans of: *De l’hospitalité: Anne Dufourmentelle invite Jacques Derrida à répondre* (first published 1997)]; Jacques Derrida, *On Cosmopolitanism and Forgiveness* (Mark Dooley and Michael Hughes trans, Routledge, 2001) [trans of: *Cosmopolites de tous les pays, encore un effort!* (first published 1997)].

²¹⁵ Ulrich Beck, ‘Global Inequality and Human Rights: A Cosmopolitan Perspective’ in Gerard Delanty (ed), *Routledge Handbook of Cosmopolitanism Studies* (Routledge, 2012) 302, 304; Ulrich Beck, *The Cosmopolitan Vision* (Ciaran Cronin trans, Polity Press, 2006) [trans of: *Der kosmopolitische Blick oder: Krieg ist Frieden* (first published 2004)].

²¹⁶ Hardt and Negri, above n 141, 110.

²¹⁷ Ibid 169.

²¹⁸ Anna Marie Smith, *Laclau and Mouffe: The Radical Democratic Imaginary* (Routledge, 1998) 32.

explanation, prediction, mastery or control'.²¹⁹ The creolisation theory of Édouard Glissant and others posits 'the encounter, the interference, the shock, the harmonies and disharmonies among cultures'²²⁰ which produces a 'limitless *métissage*, its elements diffracted and its consequences unforeseeable'.²²¹

In this way, both cosmopolitanism and its alternatives are informed by the dual facts of difference and the inevitable mixing/confrontation/contact/connection between differences. Jeremy Waldron argues that Kant himself saw cosmopolitanism as ultimately arising from reality and practicality, in that people have a 'determinate and spherical space'²²² — the planet — to share, and so must ultimately and inevitably come into contact with one another. '[T]he inevitability of contact makes it more or less impossible to regard purity, homogeneity, and splendid isolation as the normal conditions of culture': the right of hospitality merely recognises this inevitability rather than resisting it.²²³ Similarly, Appiah's observations on 'cosmopolitan contamination' lead him to this conclusion: 'Cultural purity is an oxymoron'.²²⁴

What I want to endorse in all of these sensibilities is what I will call a 'new organicism'. In using the descriptor 'new', I want to distinguish earlier usages of the term, by Plato among others, in which the universe is an intelligent organism that is internally orderly, structured and consistent.²²⁵ Such a conception of unproblematic unity and complementarity too easily harkens back to the teleological — and hierarchical — orientation that these alternative theories are seeking to escape. Rather, the matter of the universe, though organically and intrinsically interconnected and in that sense unified, is also characterised by unpredictability.

This unpredictability means that new organicism also departs from some classic modern tropes about nature. It cannot idealise nature as a paradisiacal sanctuary of Romantic innocence. Yet nor can this approach demonise nature as 'nasty, brutish and short'. There is nothing inherently innocent, nor inherently evil, about the natural world. It is neither inherently harmonic, nor inherently chaotic. Rather, it is characterised by patterns as well as contingencies. And whether patterned or chaotic, its events are deeply interconnected.

Perhaps more importantly, this approach does not exceptionalise humans as standing apart from, or over, nature. The separation between human and natural is symptomatic of a more fundamental separateness that, I argue, characterises the epistemic matrix of modernity more than any of its other features. It is the

²¹⁹ William E Connolly, *A World of Becoming* (Duke University Press, 2011) 10.

²²⁰ Dominique Chancé, 'Creolization: Definition and Critique' (Julin Everett trans) in Françoise Lionnet and Shu-mei Shih (eds), *The Creolization of Theory* (Duke University Press, 2011) 262, 265, quoting Édouard Glissant, *Traité du Tout-Monde, Poétique IV* (Gallimard, 1997) 194.

²²¹ Chancé, above n 220, 264, quoting Édouard Glissant, *Poetics of Relation* (Bestey Wing trans, University of Michigan Press, 1997) 34 [trans of: *Poétique de la relation* (first published 1990)].

²²² Jeremy Waldron, 'Cosmopolitan Norms' in Seyla Benhabib, *Another Cosmopolitanism* (Oxford University Press, 2006) 83, 91.

²²³ *Ibid* 92.

²²⁴ Appiah, above n 199, 113.

²²⁵ Gabriela Roxana Carone, *Plato's Cosmology and Its Ethical Dimensions* (Cambridge University Press, 2005).

notion of ultimate autonomy – of atomism -- that defines both the individual in the state of nature and the sovereign state in the modern political imaginary.

The point of new organics is to suggest a shift away from atomism — a shift that might mirror the shift from mechanical to quantum paradigms of knowledge in the physical sciences²²⁶ — and the accompanying suggestions not only that the universe is contingent and uncertain, rather than orderly; but also that events are radically interconnected and non-linear.²²⁷ The idea of definite and impassable barriers between self and others fails to describe this world.²²⁸

This new organicism could help to describe an ethics that fully internalises legal realist and critical understandings of law — both ‘internal critique’ (law’s indeterminacy) and ‘external critique’ (law’s potential to cause harm).²²⁹ Such an ethics would not posit a formalistic or predetermined conceptual order but, at the same time, would establish a normative basis which requires that the distributive consequences and effects of law be measured.

My critique of atomism, and my corresponding endorsement of a turn towards interconnectedness rather than individualism as the starting premise for a new ethics, is informed by two insights: first, the co-origination in early modern political thought of ideas of individualism, sovereignty and a state of nature in

²²⁶ I use ‘paradigm’ à la Thomas S Kuhn, *The Structure of Scientific Revolutions* (University of Chicago Press, 3rd ed, 1996). For another current example of application of quantum physics, see Karen Barad, *Meeting the Universe Halfway: Quantum Physics and the Entanglement of Matter and Meaning* (Duke University Press, 2007). Thanks to Kathy Biddick for pointing me in the direction of this source. Thanks also to Duncan Kennedy for an early conversation on quantum theory as applied to legal analysis and to Fitzgerald Thomas for conversations on the spiritual implications of quantum physics.

²²⁷ Examples would include the ‘butterfly effect’ in chaos theory and Werner Heisenberg’s ‘uncertainty principle’. On the latter, see Werner Heisenberg, *The Physical Principles of the Quantum Theory* (Carl Eckart and Frank C Hoyt trans, Dover, 1949) 3 [trans of: *Die Physikalischen Prinzipien der Quantentheorie* (first published 1932)]:

Particularly characteristic of [quantum physics] is the interaction between observer and object; in classical physical theories it has always been assumed either that this interaction is negligibly small, or else that its effect can be eliminated from the results by calculations based on ‘control’ experiments. This assumption is not permissible in atomic physics ...

²²⁸ I am highly sympathetic to Roberto Esposito’s vision of a ‘semipermeable self able to interact with others’. Esposito, above n 148, 165. The conception of semi-permeability enables a shift from a ‘destructive — and self-destructive — reading of the immune system’ towards a ‘process-based conception of identity as a system open to the challenges of the outside world, and indeed ultimately formed by them [in a] complex function of immune tolerance’: at 165–6. However, though I endorse the notion of semi-permeability and would see the porousness of boundaries as equally crucial, the notion of immune tolerance presupposes a negative reaction to an outside element — the underlying epistemology of atomism is not altered, though a different reaction to encounters with outside elements is envisioned. Secondly, as persuasive as Esposito’s theory is, it remains a metaphor the credibility of which is dependent upon the extent of one’s sympathy for the metaphor, whereas the new organicist approach tries to emphasise the factuality of interconnectedness. Thirdly, in terms of the desirability of the immunological metaphor, the emphasis on interior bodily and biological processes, though persuasive as the basis for a critique of social paranoia, for the same reason seems too narcissistic or, more charitably, too inward-looking a basis for a reconstructive ethics. By contrast, this new organicism would not necessarily situate others within the self or the self within others, but would state an inevitable relationship between them.

²²⁹ Chantal Thomas, ‘Critical Race Theory and Postcolonial Development Theory: Observations on Methodology’ (2000) 45 *Villanova Law Review* 1195, 1195.

which individuals and states are naturally free and independent; and, secondly, the the co-origination of political and scientific atomism.

As to the former, Richard Tuck's recent work has persuasively delineated the co-origination of the concepts of the state of nature and of sovereignty.²³⁰ Moreover, this is an atomism borne, in part, of the Scientific Revolution's mechanical physics and corpuscular medicine.²³¹ Intellectual historians have shown that the political conception of atomism, so necessary to the modern notion of individual liberty, arose at the same time as such conceptions were emerging in early modern science. For example, Nicholas Jolley has shown that Locke was influenced by Newton and Boyle. All were contemporaneous members of the English Royal Society. Locke read and corresponded with both Newton and Boyle. Newton is known as the founder of mechanical physics. Boyle's 'corpuscular hypothesis' helped to shape modern medicine.²³²

Putting these together, there is an argument to be made that the concept of a separation amongst human beings, and between human beings and nature, arises out of an early modern frame of thought that found corollaries in scientific premises that have now been at least partially destabilised by contemporary science. Consequently, if the relationship between political and scientific atomism has been disrupted by the emergence of more recent science, it may be worthwhile considering whether such disruptions bear any implications for the fundamentals of not just the physical but also the political world. If sovereignty is premised upon an atomistic conception of the state of nature, then surely a more interconnected understanding of nature raises the question whether the basic presumption of autonomy that undergirds sovereignty should shift in favour of a politics of interdependence.

Numerous potential objections might accompany such a move. Here I want to briefly address two: the problem of interdisciplinarity and the problem of naturalistic fallacy.

A major challenge for this concept is to address the problem of interdisciplinarity and whether concepts from physics can be usefully considered as cues for social theory. A notorious scandal arose as a result of at least one example of the perils of attempting this — Alan Sokal's hoax article submitted to the journal *Social Text*.²³³ Ironically (or alarmingly) enough for my purposes, the article was entitled 'Transgressing the Boundaries: Toward a Transformative Hermeneutics of Quantum Gravity'.²³⁴ In a later article ('A Physicist Experiments with Cultural Studies'), Sokal wrote:

The fundamental silliness of my article lies ... not in its numerous solecisms but in the dubiousness of its central thesis and of the 'reasoning' adduced to support it. Basically, I claim that quantum gravity — the still-speculative theory of space and time on scales of a millionth of a billionth of a billionth of a billionth of a

²³⁰ Tuck, above n 136.

²³¹ See Nicholas Jolley, *Locke: His Philosophical Thought* (Oxford University Press, 1999); Peter R Anstey (ed), *The Philosophy of John Locke: New Perspectives* (Routledge, 2003).

²³² Jolley, above n **Error! Bookmark not defined.**; Anstey, above n **Error! Bookmark not defined.**

²³³ Alan D Sokal, 'Transgressing the Boundaries: Toward a Transformative Hermeneutics of Quantum Gravity' (1996) 46–7 *Social Text* 217.

²³⁴ See Alan D Sokal, 'A Physicist Experiments with Cultural Studies' [1996] (May/June) *Lingua Franca* 62.

centimeter — has profound *political* implications (which, of course, are ‘progressive’).²³⁵

But why was this such a ridiculous move to make? Looking to the birth of the modern era, it’s quite clear that the Scientific Revolution generated profound, world-remaking, political implications. The very idea of doubt as a valid — indeed an essential — starting point in evaluating truth transformed scholarly methods not just in science but also in philosophy. It justified a decentring of religious authority that helped to fuel the drive towards the Enlightenment. There is neither anything particularly surprising about, nor anything necessarily wrong with, shifts in scientific knowledge affecting broader societal constructs of knowledge and vice versa.

This relationship is not one that scientists themselves generally study. The social-scientific field of science and technology studies (‘STS’), however, has developed a number of analytical tools to help explain these dynamics, such as Sheila Jasanoff’s idea of co-production. STS has developed a conception of science as co-originating within broader constructs of knowledge that also shape society and politics. Notwithstanding Sokal’s facetious deployment of concepts of uncertainty and interconnectedness, then, these concepts can perhaps be considered separately from his laceratingly fraudulent conclusion in the hoax piece that quantum physics proves that ‘physical reality is at bottom a social and linguistic construct’.²³⁶

Let us assume, however, that quantum physics reflects a world view framed by interconnectedness and uncertainty and that these notions have the potential of taking hold in larger society and politics. Even if this is the case, why, should we adopt such a view? This is the second problem of naturalistic fallacy (the is–ought problem). Just because things ‘are’ a certain way, we need not conclude that they ‘should’ be. Such a presumption would kill any impulse towards political reform. Let’s say that quantum physics does describe something important about the world. Why should we take that as the basis for aspirational ethics? In some ways this is a subtle but thornier problem than the Sokal objection to interdisciplinarity.

But the answer need not be complicated. Does is equate to ought? In a word, no. Rather than inferring a moral obligatoriness from new empirical descriptions of our physical world, we can instead take these descriptions as a cue, an invitation, to revisit basic assumptions in our political framework. We can then ask ourselves: would shifting these basic political assumptions help us to create a world that is more just? If the answer is yes, then that, rather than any automatic inference from empirics, is the reason to revise our basic politics. In that sense, ideas from physics do no more than offer us an opportunity: a set of tools with which to see our social world from a new perspective and to consider our politics in a new light.

With the above qualifications, it is my sense that we should embrace these tools. To adopt a posture of organic — that is to say — inherent,

²³⁵ Sokal, ‘A Physicist Experiments with Cultural Studies’, above n 234, 3 (emphasis in original).

²³⁶ Sokal, ‘Transgressing Boundaries’, above n 233, 217. For an example of a cautious adaptation of physics for lawyers, see Laurence H Tribe, ‘The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics’ (1989) 103 *Harvard Law Review* 1.

interconnectedness would necessarily change the starting point for consideration of migration law and policy and the frame for debating possibilities for reform. Such transformations might better reflect the new knowledges and sensibilities of the age.